Supreme Court, U.S.
FILED

932055 JUN 22 1994

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

BARBARA RINGER, in her capacity as Acting Register of Copyrights, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS *
R. CLARK WADLOW
MARK D. HOPSON
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioners, Satellite Broadcasting & Communications Association of America, et al.

* Counsel of Record

June 22, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

50pp

QUESTION PRESENTED

Whether a panel of a court of appeals is free to disregard the *stare decisis* effect, recognized by this Court in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992), of a prior panel decision independently interpreting a federal statute solely on the basis of a federal agency's intervening rule adopting a contrary interpretation of the same statutory language.

PARTIES TO THE PROCEEDING

The following entities were named plaintiffs in this action:

Satellite Broadcasting & Communications Association of America
Southern Satellite Systems
Netlink, USA
Eastern Microwave, Inc.
Primetime 24
Superstar Connection (United Video)

The following entities were named defendants in this action:

The United States
The Copyright Office of the Library of Congress

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Satellite Broadcasting & Communications Association of America is a not-for-profit trade association and has no parent company or subsidiaries.

Southern Satellite Systems and Netlink, USA are not participants in this petition for a writ of certiorari.

Newhouse Broadcasting Corp. is the parent company of Eastern Microwave, Inc., which has no wholly owned subsidiaries.

PrimeTime 24 is a joint venture of American Satellite Network, Inc., Satellite Broadcast Networks, Inc., and PrimeTime Relay Corp., and has no subsidiaries.

Superstar Satellite Entertainment, a division of United Video Satellite Group, Inc., is the successor of Superstar Connection (United Video).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
DISCLOSURE STATEMENT PURSUANT TO RULE 29.1	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Proceedings Below	7
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Arizona v. *Rumsey*, 467 U.S. 203 (1984) 10
BPS Guard Servs., Inc. v. *NLRB*, 942 F.2d 519 (8th Cir. 1991) 14
Battle v. *Delo*, 19 F.3d 1547 (8th Cir. 1994) 16
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 8, 10, 11, 12
Derflinger v. *Ford Motor Co.*, 866 F.2d 107 (4th Cir. 1989) 15
Eastern Microwave, Inc. v. *Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) 3, 4
Feliciano-Angulo v. *Rivera-Cruz*, 858 F.2d 40 (1st Cir. 1988) 15
General Dynamics Corp. v. *United States*, 773 F.2d 1224 (Fed. Cir. 1985), *cert. denied*, 476 U.S. 1181 (1986) 16
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989) 12
In Re Grand Jury Subpoena, 826 F.2d 1166 (2d Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) 15
Haas v. *Abrahamson*, 910 F.2d 384 (7th Cir. (066I 16
Hilton v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560 (1991) 10
Humane Soc'y v. *EPA*, 790 F.2d 106 (D.C. Cir. 1986) 16
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 13
Lechmere, Inc. v. *NLRB*, 112 S. Ct. 841 (1992) 8, 11, 13
Matter of Dyke, 943 F.2d 1435 (5th Cir. 1991) 16
Myrick v. *Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994) 16
NBC v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991) 5, 6, 11
NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) 13
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 10, 17
Teleprompter Corp. v. *CBS*, 415 U.S. 394 (1974) 3
United States v. *Beal*, 810 F.2d 574 (6th Cir. 1987) 16

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Monaco*, No. 93-5261, 1994 WL 174898 (3d Cir. May 10, 1994)	15
United States v. *Palacio*, 4 F.3d 150 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994)	14
United States v. *Spedalieri*, 910 F.2d 707 (10th Cir. 1990)	16
United States v. *Washington*, 872 F.2d 874 (9th Cir. 1989)	16
Variable Annuity Life Ins. Co. v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.*, 62 U.S.L.W. 3707 (U.S. June 6, 1994)	9, 13, 17
Welch v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987)	10

STATUTES, RULES, REGULATIONS

Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 101 *et seq.*)	2, 3
Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified at 17 U.S.C. § 119)	5
5 U.S.C. § 701 *et seq.*	7
17 U.S.C. § 111	2, 4
§ 119(a)	5
S. Ct. R. 10.1(a)	17
Fed. R. App. P. 35(a)	16
1st Cir. R. 35.1	16
3d Cir. R. Addendum A R. 9.2	16
4th Cir. R. 35	16
5th Cir. R. 35.2.2	16
6th Cir. R. Addendum II R. 20.8	16
7th Cir. R. Practitioner's Handbook XXV	16
8th Cir. R. 35A	16
9th Cir. R. 35-1	16
10th Cir. R. LR 35.2.2	16
11th Cir. R. 35-6	16
D.C. Cir. R. 35(c)	16
Fed. Cir. R. 35(b)	16
37 C.F.R. § 201.17(k)	7

TABLE OF AUTHORITIES—Continued

Page

Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992) 7
Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580 (1991) 6
Extension of Comment Period; Inquiry of Definition of Cable Systems, 53 Fed. Reg. 17,962 (1988) 6

LEGISLATIVE HISTORY

H.R. Rep. No. 887, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611 5
H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. ——

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

BARBARA RINGER, in her capacity as Acting Register of Copyrights, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Satellite Broadcasting & Communications Association of America ("SBCA"), Eastern Microwave, Inc., Prime-Time 24, and Superstar Satellite Entertainment ("petitioners"), hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a-9a) is reported at 17 F.3d 344. The opinion of the United States District Court for the Northern District of Georgia (App. 10a-16a) is reported at 26 U.S.P.Q.2d 1313.

JURISDICTION

The decision and judgment of the court of appeals was entered on March 24, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Copyright Act, 17 U.S.C. § 101 *et seq.*, provides in relevant part:

> [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing.

17 U.S.C. § 111(c)(1).

In relevant part, the Copyright Act defines "cable system" for purposes of the Section 111(c)(1) compulsory license as follows:

> A "cable system" is a facility, located in any State, Territory, trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.

17 U.S.C. § 111(f).

STATEMENT OF THE CASE

A. Factual Background

The Satellite Carrier Industry: Petitioners are the Satellite Broadcasting and Communications Associations of America ("SBCA") and certain of its members. SBCA is the satellite industry trade association, and its members include satellite carriers, programmers, distributors, satellite manufacturers and operators, equipment manufacturers, and retail dealers.

Satellite carriers provide a broad range of television programming to consumer households, particularly those in sparsely populated and rural communities which would not otherwise be served by cable television. Many satellite service subscribers live in areas of the United States where there is no traditional wired cable operator. In many such areas, it simply is not economically feasible to run wires to each individual home. In those areas, satellite carriers provide the service that wired cable operators otherwise would provide, by relying on retransmission of signals by satellite, instead of by wires or cables.

In addition, satellite carriers provide a competitive alternative to local cable operators. More than 99 percent of the households in the United States have access to no more than one local cable operator. But satellite carriers can provide service to all markets and thus have the ability to provide essential competition to local cable operators that otherwise is unavailable. Satellite carriers transmit virtually the same programming as local cable operators, with the only difference being the technology used to transmit the signal.[1]

The Section 111 Compulsory License: Under the copyright laws prior to 1976, satellite carriers would have had no liability to copyright owners for their retransmissions of broadcast signals. See *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 407-09 (1974) (holding that retransmissions were not "performances" within the meaning of the 1909 Copyright Act). In the Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at

[1] In essence, satellite carriers receive signals broadcast by television stations or from other sources and then retransmit those signals via satellite to owners of home satellite dishes. *See Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d 125, 128 (2d Cir. 1982). Satellite carriers maintain receiving antennas on the ground and utilize ground-based uplink facilities in making the retransmissions. The signals are scrambled by the carriers and can be viewed only by home satellite dish owners who have obtained descrambling devices and who pay a monthly fee.

17 U.S.C. § 101 *et seq.*) ("Copyright Act"), however, Congress extended limited copyright protection to broadcasts retransmitted by "cable systems" and, at the same time, made those retransmissions subject to compulsory licensing under the Copyright Act. 17 U.S.C. § 111(c).

Under the Section 111 compulsory license, a "cable system" has an absolute right to retransmit broadcasts, subject to the filing of a statement of account and the payment of royalty fees, see 17 U.S.C. § 111(d)(1)(A)-(D), (2), and (3), so long as it does not delete or alter commercial advertising on the broadcasts, *id.* § 111(c)(3). The Act broadly defines a "cable system" as:

> a facility, located in any State . . . [that] receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals or programs by wires, cables, *or other communications channels* . . . .

17 U.S.C. § 111(f) (emphasis added). In reliance on this statutory definition, satellite carriers acted in accordance with the requirements of Section 111(d) and filed statements of account and deposited royalty fees with the Copyright Office in 1987 and 1988.[2]

The NBC v. *Satellite Broadcast Networks Decision:* In 1987, the National Broadcasting Company ("NBC") and several of its affiliates filed suit against Satellite Broadcast Networks ("SBN"), the predecessor of Prime-

---

[2] Congress created a compulsory license for "cable systems" in recognition of the fact that "it would be impractical and unduly burdensome to require every cable system to negotiate [royalty payments] with every copyright owner." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89-90 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704; *see also Eastern Microwave*, 691 F.2d at 132 (rejecting proposed construction of Copyright Act because it "would defeat Congress' intent by imposing on [a satellite carrier] the unworkable separate negotiations with numerous copyright holders from which the Act sought to free [cable] systems").

Time 24, one of the petitioners here. NBC and its affiliates alleged that SBN had "infringed NBC's exclusive rights in copyrighted work by rebroadcasting" NBC's copyrighted programs. *NBC* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467, 1468 (11th Cir. 1991) (footnote omitted) ("*SBN*") (App. 17a-25a), App. 18a. SBN's defense was that it had not infringed those copyrights because its rebroadcasts were licensed pursuant to the Section 111 compulsory license. The district court granted summary judgment for NBC, holding that SBN was not a "cable system" within the meaning of Section 111(f) and therefore was not eligible for the compulsory license. The district court reasoned that because SBN was not "located entirely within a single state," it did not fit the statutory definition of a "cable system." See *SBN*, App. 20a, *supra* p. 2.[3]

The Eleventh Circuit reversed, holding that "SBN is a cable system as defined under § 111 whose secondary transmissions were permissible under FCC rules and reg-

---

[3] In response to the district court decision—the first decision to address the question whether a satellite carrier was a "cable system"—Congress enacted the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified at 17 U.S.C. § 119) ("SHVA"). SHVA creates a compulsory license specifically for satellite carriers, 17 U.S.C. § 119(a), and suspends any rights satellite carriers have under § 111 as long as SHVA is in effect, *id.* § 119(e). SHVA took effect on January 1, 1989, *id.* § 119 Note, and by its terms "cease[s] to be effective on December 31, 1994." *Id.* In enacting SHVA, Congress made clear that nothing in SHVA "is intended to reflect any view as to the proper interpretation of section 111 of this title prior to enactment of this Act, or after this Act ceases to be effective on December 31, 1994," H.R. Rep. No. 887, 100th Cong., 2d Sess. 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611, 5630.

Because SHVA does not cover the years prior to 1989 and because SHVA will expire by its own terms at the end of this year, the availability of the compulsory license contained in § 111 continues to be crucial to satellite carriers. Indeed, this issue becomes a matter of increasing concern with each passing day.

ulations." *SBN*, App. 25a. Based upon its review of the language and structure of the cable compulsory license provisions, the court of appeals was "unpersuaded that 'located in any State' means located entirely within a single state." *Id.* at 22a. Moreover, "nothing in the words Congress chose counsel that only local cable companies be included" under Section 111. *Id.* The court also "considered the views of the Copyright Office [in its 1991 statement] on the language and legislative history of § 111," as expressed in its then-ongoing rulemaking on this issue (see *infra* pp. 6-7), but it found those views "unpersuasive." *Id.* at 20a n.4. Accordingly, the court held that SBN, as a satellite carrier, was a "cable system" for purposes of Section 111(f), and the court therefore concluded that the rebroadcast by SBN "infringed no copyright." *Id.* at 25a.

The Copyright Office Rulemaking: At the same time that the *SBN* litigation was proceeding, the Copyright Office expanded a pending rulemaking to consider the question whether "a satellite carrier . . . is a 'cable system' eligible for a cable compulsory license pursuant to section 111." Extension of Comment Period; Inquiry of Definition of Cable Systems, 53 Fed. Reg. 17,962 (1988). After receiving comments, the Copyright Office issued a statement on July 11, 1991, in which the Office stated that it was "inclined to agree" with the conclusion of the district court in *SBN* that the statutory term "cable system" in Section 111(f) did not include satellite carriers. Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590-91 (1991).[4]

---

[4] The panel of the Eleventh Circuit in *SBN* noted in passing that the Copyright Office had issued this statement after oral argument had been held. *SBN*, App. 20a n.4. The court noted that this definition did not apply retroactively, and in any event the interpretation of the Copyright Office was "unpersuasive." Since the Copyright Office's promulgation was not before the court on review, the court, of course, expressed no opinion as to the definition's validity.

After the Eleventh Circuit reversed the district court's decision in *SBN*, the Copyright Office "reconsidered" its previous position. Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992). On reconsideration, the Copyright Office expressly rejected the Eleventh Circuit's interpretation of Section 111(f) in *SBN* and promulgated a final rule interpreting Section 111(f) to exclude satellite carriers from the definition of "cable systems." *Id.* at 3296; 37 C.F.R. § 201.17(k). The Copyright Office made clear that its disagreement with the Eleventh Circuit on the proper construction of the statute was based solely on its own reading of the "definitional requirements" of Section 111(f) and not upon consideration of any "public policy objectives." 57 Fed. Reg. at 3292.

B. Proceedings Below

Petitioners filed the present action under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, challenging the Copyright Office's final rule on the definition of "cable systems" under Section 111(f) as contrary to law. The parties filed cross-motions for summary judgment, and the case was submitted to the district court on the undisputed facts.

The district court held in favor of petitioners and entered judgment declaring the Copyright Office rule invalid. The court reasoned that because the Eleventh Circuit had already interpreted the meaning of Section 111(f) in *SBN*, the panel's prior interpretation of the statute was binding as a matter of *stare decisis*. App. 14a-16a. The district court held that it would not "reconsider a question already resolved by a previous opinion issued by its own appellate court." *Id.* at 16a. Because "the regulation issued by the Copyright Office clearly conflicts" with the Eleventh Circuit's determination that a satellite carrier is a cable system within the meaning

of Section 111, the district court concluded that "principles of *stare decisis* require this court to set aside the regulation of the Copyright Office." *Id.* at 14a.

The Copyright Office filed an appeal and chose to submit the case to a panel of the Eleventh Circuit rather than to the full court for *en banc* review. The panel reversed, holding that "[a]lthough the new regulations conflict with our interpretation of [Section 111(f)] . . . [t]hey are . . . [a] valid exercise[] of the Copyright Office's statutory authority to interpret the provisions of the compulsory licensing scheme, and are *binding* on this circuit." App. 2a (emphasis added). Although the Eleventh Circuit panel in *SBN* previously had engaged in a *de novo* interpretation of the term "cable system" as used in Section 111(f)—and had rejected the Copyright Office's contrary interpretation as "unpersuasive"—the panel concluded that it was "not precluded from revisiting [its] initial interpretation." *Id.* at 8a. Rather, the court below concluded that under the rule set forth by this Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), federal courts "generally must defer to an agency statutory interpretation that is at odds with circuit precedent" as long as the agency interpretation is a "permissible" construction of the statute. App. 6a.

The panel expressly rejected petitioners' argument that it was bound to follow the court's prior interpretation of Section 111(f) in *SBN* pursuant to the rule of *stare decisis* set forth in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847-48 (1992) ("*Lechmere*"), in which this Court held that once a statute's meaning had been interpreted "we judge an agency's later interpretation of the statute against our prior interpretation." The panel stated that it was not bound by *stare decisis* under *Lechmere*, and held that a "contrary result illogically would wed this circuit to the *SBN* decision, while all other circuits and

the Supreme Court would be bound under *Chevron* to defer to the Copyright Office rule." App. 8a.[5]

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's holding that *Chevron* principles of deference to an agency's interpretation of a statute take precedence over the doctrine of *stare decisis* as applied in *Lechmere* presents an important and recurring issue of federal law. Moreover, the decision below squarely conflicts with decisions in the Second, Fifth and Eighth Circuits that have expressly rejected the argument that a federal court must defer to an agency's interpretation of a statute when that interpretation conflicts with existing circuit precedent. These circuits all have correctly interpreted this Court's decision in *Lechmere* to stand for the proposition that an administrative agency is not free to overrule judicial precedent. Because this Court is currently reviewing one iteration of this rule in *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.*, 62 U.S.L.W. 3707 (U.S. June 6, 1994), at a minimum, this petition for certiorari should be held pending this Court's decision in *Variable Annuity*.

However, the decision below independently warrants review by this Court because resolution of the underlying issue of statutory interpretation involves matters of profound importance for the satellite broadcasting industry and the public, particularly households in less densely populated areas that are not served by traditional wired cable operators, and others that rely on satellite broadcasts to provide a competitive alternative to traditional

---

[5] The panel also noted that the *SBN* decision was not binding under *Lechmere* because the interpretation of Section 111(f) by the *SBN* panel "rested . . . not upon the statute's 'clear meaning,' but rather upon inferences drawn from the statutory scheme and upon our policy determination that satellite carriers should be included for the benefit of their rural customers." App. 7a-8a; *but see infra* note 8.

wired cable service. Under the interpretation of Section 111(f) adopted by the Copyright Office and accepted by the panel below, satellite operators will have to work out individual copyright agreements with each program's copyright holder. See *supra* note 3. At best, if these individual agreements can be worked out, the satellite operators will be at a tremendous economic disadvantage with their competitors, wired cable companies. On the other hand, if these agreements cannot be worked out, the very existence of the satellite broadcasting industry is threatened.

1. This Court repeatedly has held that "any departure from the doctrine of *stare decisis* demands special justification." See, *e.g.*, *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). This is so because "the doctrine . . . is of fundamental importance to the rule of law." *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). *Stare decisis* and its concomitant "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 564 (1991). Moreover, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," because Congress is free to "alter" what the courts have done with the statutes it has enacted. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

This Court's decision in *Chevron*, 467 U.S. 837, did not undermine the preeminent importance of the doctrine of *stare decisis*.[6] Indeed, this Court in *Chevron* made clear that it is the judiciary, and not an administrative

[6] In *Chevron* this Court fashioned a two-step approach to govern the manner in which courts review an agency's interpretation of a statute it administers pursuant to congressional delegation. 467 U.S. at 843-44. First, the statute is examined to determine if the intent of Congress is clear. If it is, the courts and the agency must abide by that intent. If it is not, then the courts are to defer to the agency's determination. *Id.* The standard of deferential review varies depending on the nature of the congressional delegation. *Id.* at 844-45.

agency, that is "the final authority on issues of statutory construction." 467 U.S. at 843 n.9. Moreover, the Court held that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* This Court in *Lechmere* subsequently made clear that once a court has determined a statute's meaning, " 'under the doctrine of *stare decisis*, [a court must] judge an agency's later interpretation of the statute against [its] prior determination of the statute's meaning.' " 112 S. Ct. at 847-48 (quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)).

The court below, however, rejected this analysis, holding that the Copyright Office's interpretation of Section 111(f) was "binding" on the court. Although a panel of the Eleventh Circuit already had concluded that there was "no good reason" for interpreting the term "cable system" in Section 111(f) to exclude satellite broadcasters, *SBN*, App. 23a, the court below did not apply principles of *stare decisis* in determining whether the Copyright Office's contrary interpretation of Section 111(f) met the first step of the *Chevron* analysis.[7] Instead, the court below

---

[7] Not only did the Eleventh Circuit manifestly misapply the first *Chevron* criterion, it also applied the wrong standard of deference when it erroneously reached the second criterion. This Court held that where Congress has *expressly* delegated "authority to the agency to elucidate a specific provision of the statute by regulation" then the court must uphold the interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. Whatever delegation Congress made to the Copyright Office, it did not expressly delegate to the Copyright Office the authority to interpret whether § 111 applies to the satellite broadcasitng industry. *If* application of the *Chevron* criterion had been called for in the case below, the Eleventh Circuit should have used the standard for *implicit* delegation, *i.e.*, a court cannot overturn "a *reasonable* interpretation made by the administrator of an agency." *Id.* at 844 (emphasis added). Because there was "no good reason" to interpret the statute the way it did, the Copyright Office's construction of § 111 was both arbitrary and unreasonable.

concluded that the principles of *stare decisis* set forth by this Court in *Lechmere* are not applicable to the courts of appeals, leaving them free to "revisit [their] initial interpretation" of the statute in light of a subsequent agency interpretation. See App. 8a (reasoning that application of *stare decisis* at the court of appeals level "illogically would wed this circuit to the *SBN* decision while all other circuits and the Supreme Court" would be free to reach a contrary result).[8]

The reasoning of the court below is patently inconsistent with this Court's decisions in *Lechmere* and *Chevron*, which make clear that before a court undertakes to determine whether an agency's interpretation passes muster under the second, deferential step of *Chevron*, it must, as a preliminary matter, determine whether the agency's construction is consistent with Congress' manifest intent embodied in the language of the statute. In making this determination, *Lechmere* instructs that if there is binding

---

[8] The Eleventh Circuit also held in the alternative that its departure from the norms of judicial governance was justified because the *SBN* decision did not claim to have discussed the "clear meaning" of § 111. *See supra* note 5. Such a strained explanation of the holding in *SBN* lacks merit. In *SBN*, the Eleventh Circuit, using "traditional tools of statutory construction," determined the meaning of the statute as evinced by the intent of Congress. And that intent—to include cable systems other than traditional wire-based systems within the compulsory license provision of § 111—must be given effect. *See Chevron*, 467 U.S. at 843-44 & n.9.

Even if the *SBN* decision's consideration of congressional intent had not considered the "clear meaning" of § 111, that decision would still be binding precedent until changed by Congress (or the court *en banc* or this Court). For example, in interpreting the "*Machinists* rule" of the National Labor Relations Act—a rule "not set forth in the specific text of an enumerated Section of the NLRA" but nonetheless intended by Congress—this Court held that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute," and that only Congress could "retract" such a holding. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 111-12 (1989).

judicial precedent independently construing the plain language of the statute, such precedent must be respected. 112 S. Ct. at 847-48. Thus, the doctrine of *stare decisis* is applicable under the *first*, non-deferential step of the *Chevron* analysis, *see* 112 S. Ct. at 847, and it is this preliminary step that is most important in cases—such as the instant case—involving "pure question[s] of statutory construction." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 446 (1987).

2. The decision below also is inconsistent with the holding of three other circuits that have flatly rejected the approach taken by the Eleventh Circuit. In *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.*, 62 U.S.L.W. 3707 (U.S. June 6, 1994), the Fifth Circuit held that it would abide by its previous construction of a provision of the federal banking statutes. The court expressly refused to adopt a subsequent interpretation of that provision by the Comptroller of the Currency, holding that "deference under *Chevron* does not permit administrative agencies to overrule precedents." *Id.* at 1300 (citing *Lechmere*). The Fifth Circuit correctly concluded that "[w]hile administrative agencies serve important functions, these do not include the occlusion of the positivistic declarations of this court." *Id.*[9]

The Second Circuit also has rejected the abdictation of judicial responsibility to follow *stare decisis* employed by

[9] The *Variable Annuity* case may not necessarily be a suitable vehicle for resolving the issue presented in this petition, given that case's underlying banking and insurance industry context. Nevertheless, this Court may affirm that decision on the ground that the panel properly followed the principle of *stare decisis* and thereby not reach the underlying industry issues. Obviously, such a decision would justify a remand in this case. Thus, the Court should hold this petition pending the outcome of *Variable Annuity*. If, however, the Court does not decide the *stare decisis* issue in that case, then the Court should grant certiorari in this case to resolve the circuit conflict.

the Eleventh Circuit in the instant case. In *United States* v. *Palacio*, 4 F.3d 150 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994), the Second Circuit refused to construe the statutory term "cocaine base" in accordance with a guideline subsequently proposed by the Sentencing Commission. The court explained that "once we have construed the statute, we will not reinterpret it in the absence of new guidance from Congress . . . when our initial construction of a statute is solely the result of an independent judicial interpretation of a statutory term. . . ." 4 F.3d at 154 (citing *Lechmere* and *Chevron*).

Finally, the Eighth Circuit also has refused to put aside the doctrine of *stare decisis* in reviewing subsequent statutory interpretations by agencies. In *BPS Guard Servs., Inc.* v. *NLRB*, 942 F.2d 519 (8th Cir. 1991), the NLRB argued that under *Chevron* the circuit's previous interpretation of a statute should be set aside in favor of the agency's subsequent construction of the statutory provision. The court rejected the proffered interpretation, holding that "*Chevron* does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body." *Id.* at 523. The court further noted that "[a]n agency's decision to refuse to follow controlling precedent hardly can be characterized as an exercise of discretion." *Id.*

The Eleventh Circuit's decision below simply cannot be reconciled with these decisions of the courts of appeals in the Second, Fifth and Eighth Circuits. This Court should grant certiorari to resolve this conflict in the circuits regarding the appropriate interplay between principles of agency deference articulated in *Chevron* and the doctrine of *stare decisis*, as set forth in *Lechmere*.

3. The *Chevron-Lechmere* issue is not merely a matter of jurisprudential curiosity. The failure to have a uniform rule in the courts of appeals concerning the proper relationship between *Chevron* and *Lechmere* is a matter of significant practical importance. If the decision of the

Eleventh Circuit holding that *Lechmere* applies exclusively to this Court is allowed to stand, district courts will be placed in the impossible situation of having to guess how the Eleventh Circuit will treat its own prior case law and the rule of law within the circuit will swiftly erode. Every time a district court is presented with conflicting interpretations of a statute by an agency and a panel of the court of appeals, it will be forced to attempt to divine which construction the next panel of the court of appeals will adopt after its "revisitation." Such a task will lead inevitably to repeated failure and the "law of the circuit" will be in perpetual flux. Such a result will impair the ability of litigants and other persons to govern their conduct prospectively in accordance with the law of the circuit. Respect for judicial authority, which is engendered by the stability of court decisions and the predictability that stability creates, will evaporate. These are the precise concerns that led to this Court's decision in *Lechmere* and they demonstrate why the *Lechmere* rule applies with equal force to the lower courts.

Finally, it is neither unusual or inappropriate for a panel of a court of appeals to be bound by a prior decision of the court, despite the suggestion to the contrary by the court below. App. 8a ("[a] contrary result illogically would wed this circuit to [its prior] decision"). *Stare decisis* is the rule and not the exception. And this doctrine applies equally to the courts of appeals, not just this Court.[10] Even if a subsequent panel believes a prior

---

[10] *Feliciano-Angulo* v. *Rivera-Cruz*, 858 F.2d 40, 44 n.5 (1st Cir. 1988) ("*stare decisis* requires panels in this circuit to follow circuit precedent"); *In Re Grand Jury Subpoena*, 826 F.2d 1166, 1172 n.3 (2d Cir. 1987) ("a subsequent panel is obliged to follow the precedents established by prior panels of this Circuit"), *cert. denied*, 487 U.S. 1218 (1988); *United States* v. *Monaco*, No. 93-5261, 1994 WL 174898, at *9 (3d Cir. May 10, 1994) ("no panel of this court may overrule the holding of a previous panel"); *Derflinger* v. *Ford Motor Co.*, 866 F.2d 107, 110 (4th Cir. 1989) ("[t]he general rule

decision to be wrong, or even if the decision creates a split of authority among the circuits, existing mechanisms already provide the proper means for rectifying any judicial errors. First, the court of appeals sitting *en banc* can reverse or overturn prior circuit decisions.[11] Second, review can be sought before this Court, whose rules gov-

---

in this Circuit is that one panel cannot overrule another panel. . . . *Stare decisis* requires that we follow our earlier determination as to the law") (internal quotations omitted); *Matter of Dyke*, 943 F.2d 1435, 1442 (5th Cir. 1991) ("[i]n this circuit, one panel may not overrule the decision—right or wrong—of a prior panel, absent en banc reconsideration or a superseding contrary decision of the Supreme Court"); *United States* v. *Beal*, 810 F.2d 574, 577 (6th Cir. 1987) ("[i]t is well established in this circuit that once a panel has ruled on an issue, it becomes the law of the circuit and may not be overruled by another panel"); *Haas* v. *Abrahamson*, 910 F.2d 384, 393 (7th Cir. 1990) ("[w]e note that principles of *stare decisis* require that we give considerable weight to [prior decisions of this court] unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments") (internal quotations omitted); *Battle* v. *Delo*, 19 F.3d 1547, 1553 (8th Cir. 1994) ("[a]s a panel we must follow the decisions of another panel as the law of the circuit"); *United States* v. *Washington*, 872 F.2d 874, 880 (9th Cir. 1989) ("[w]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions") (internal quotations omitted); *United States* v. *Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990) ("[a]s a panel, we are bound to adhere to prior circuit precedent"); *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516, 1521 (11th Cir. 1994) ("[i]t is the law of this Circuit that we are bound by a prior panel's decision except to the extent it is altered by a supervening Supreme Court decision"); *Humane Society* v. *EPA*, 790 F.2d 106, 111 n.32 (D.C. Cir. 1986) ("[a]s a panel, we are bound by prior decisions of this court"); *General Dynamics Corp.* v. *United States*, 773 F.2d 1224, 1225 n.2 (Fed. Cir. 1985) ("a panel of this court is bound by prior precedential decisions unless and until overturned"), *cert. denied*, 476 U.S. 1181 (1986).

[11] 1st Cir. R. 35.1; 3d Cir. R. Addendum A R. 9.2; 4th Cir. R. 35; 5th Cir. R. 35.2.2; 6th Cir. R. Addendum II R. 20.8; 7th Cir. R. Practitioner's Handbook XXV (2); 8th Cir. R. 35A; 9th Cir. R. 35-1; 10th Cir. R. LR35.2.2; 11th Cir. R. 35-6; D.C. Cir. R. 35(c); Fed. Cir. R. 35(b); and Fed. R. App. P. 35(a).

erning the grant of certiorari specifically note the special importance the Court gives to resolving decisional conflicts between the circuits.[12] Third, Congress itself is free to intervene and amend the underlying law and to clarify its intent.[13] The Eleventh Circuit is ill served by adopting an alternative mechanism for resolving interpretative conflicts by revisiting and even rejecting its prior statutory interpretations. Litigants and lower courts, both in the Eleventh Circuit and elsewhere, are entitled to a clearer set of guidelines in determining when prior panel opinions will be respected and when they will be discarded. Only this Court can provide the necessary guidance and therefore it should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.*, 62 U.S.L.W. 3707 (U.S. June 6, 1994)

Respectfully submitted,

CARTER G. PHILLIPS *
R. CLARK WADLOW
MARK D. HOPSON
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners, Satellite Broadcasting & Communications Association of America, et al.

* Counsel of Record

June 22, 1994

---

[12] S. Ct. R. 10.1(a).

[13] *See, eg., Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-8395

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Plaintiffs-Appellees,

v.

RALPH OMAN, in his capacity as Register of Copyrights, and Director of the Copyright Office of the Library of Congress, and the COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS and UNITED STATES OF AMERICA,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

March 24, 1994

Before KRAVITCH and CARNES, Circuit Judges, and HAND *, Senior District Judge.

KRAVITCH, Circuit Judge:

This appeal calls upon the court to review the United States Copyright Office's ("Copyright Office") promulga-

---

* Honorable William B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

tion of regulations which deny satellite broadcasters the right to subscribe to the compulsory licensing scheme set forth at 17 U.S.C. § 111. Based on this court's previous holding in *NBC v. Satellite Broadcast Networks*, 940 F.2d 1467 (11th Cir.1991) ("*SBN*"), the district court invalidated the Copyright Office regulations. The Copyright Office appeals.

Although the new regulations conflict with our interpretation of the term "cable system" in *SBN*, they are neither arbitrary, capricious, nor in conflict with the clear meaning of the statute. They are therefore valid exercises of the Copyright Office's statutory authority to interpret the provisions of the compulsory licensing scheme, and are binding on this circuit. Accordingly, we REVERSE the district court's invalidation of the regulations.

I.

Plaintiffs comprise the Satellite Broadcasting and Communications Association ("SBCA"), a trade group representing satellite carriers. Satellite carriers receive signals broadcast by television stations and then retransmit those signals by satellite to satellite dishes located in the homes of their subscribers.

This dispute centers on whether satellite carriers are "cable systems" for purposes of Copyright Act § 111, which defines a "cable system" as:

> a facility, *located in* any State, Territory, trust Territory, or Possession, that . . . receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals.

17 U.S.C. § 111(f) (emphasis added). If satellite carriers are "cable systems," then they are entitled to subscribe to the compulsory licensing system set forth in that

section.[1] This, in turn, would entitle satellite carriers to transmit copyrighted television broadcasts, so long as they pay royalties and abide by the procedures of the licensing scheme. By contrast, if satellite carriers are not "cable systems," then they are not permitted to subscribe to the licensing scheme and must find an alternate method of obtaining rights to their desired broadcasts.[2]

The Eleventh Circuit held in *SBN* that satellite carriers are "cable systems" covered by the compulsory licensing scheme. In *SBN*, NBC brought a copyright infringement action against SBN, a satellite carrier, alleging that SBN had rebroadcast NBC's signals without its permission. Interpreting the definition of "cable system" under § 111(f), this court held that satellite carriers implicitly were included in the compulsory licensing scheme, and that SBN

---

[1] Title 17 U.S.C. § 111 provides for the compulsory licensing scheme, stating:

> [S]econdary transmissions to the public by *a cable system* of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing upon compliance with [procedural requirements and payment of mandatory royalties] where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.

17 U.S.C. § 111(c)(1) (emphasis added).

[2] In the Satellite Home Viewer Act of 1988, Congress created a compulsory licensing scheme for satellite carriers by adding § 119 to the Copyright Act. Pub.L. No. 100-667, §§ 201-02, 102 Stat. 3949-58 (1988). However, Section 119—which will expire on Dec. 31, 1994—offers little guidance in interpreting § 111 because the accompanying House Report stated:

> [N]othing in this Act is intended to reflect any view as to the proper interpretation of section 111 of this title prior to enactment of this Act, or after this Act ceases to be effective. . . . In particular, nothing in this Act is intended to reflect any view concerning whether . . . an entity that retransmits television broadcast signals by satellite to private home could qualify as a "cable system" under section 111(f).

H.R.Rep. No. 100-887(I). 100th Cong.2d Sess. at 27 (1988), U.S. Code Cong. & Admin.News 1988 at 5527, 5630.

thus had engaged in no infringing behavior. We rejected the suggestion that to be a "facility located in any state" pursuant to § 111(f), a "cable system" must be located *entirely* within a single state.[3] We further reasoned that there existed "no good reason" to prevent the often rural customers of satellite carriers from receiving the benefits afforded other cable viewers. *See* 940 F.2d at 1470.

Subsequent to oral argument in *SBN*, the Copyright Office issued a policy decision stating that satellite carriers are not "cable systems" under § 111(f). The Office reasoned that § 111(f) requires carriers to receive and transmit signals from within a single state, which is not the case with satellite technology. *See Id.* at 1469-70 n. 4 (citing Fed.Reg. 31,580 (1991)). We considered this policy decision in deciding *SBN*, but ultimately found it unpersuasive and, in any event, not retroactive. We emphasized, however, that we "of course express[ed] no opinion on the new rule's validity as applied prospectively." *Id.*

In 1992, after a notice and comment period, the Copyright Office affirmed its prior policy decision by promulgating a final rule which provided that carriers are not "cable systems" under § 111(f). 57 Fed.Reg. 3283, 3296 (January 29, 1992) (codified at 37 C.F.R. § 201.17(k)).[4] In its analysis, the Office roundly criticized our decision in

---

[3] We based our broader reading of § 111(f) primarily on the section's restriction of "secondary transmissions" to transmissions by " 'cable system[s]' not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico." 940 F.2d at 1470. This definition suggested to us that a cable system might be located partly in Alaska and partly in another state, and thus need not be located within a single state.

[4] The Copyright Office added to 37 C.F.R. § 201.17 paragraph (k), which provides:

> Satellite carriers and MMDS not eligible. Satellite carriers, [and] satellite resale carriers . . . are not eligible for the cable compulsory license based upon an interpretation of the whole section 111 of title 17 of the United States Code.

SBN and offered several reasons directing an opposite conclusion. First, as the Copyright Office interpreted the statute, satellite carriers are not "located in any state, let alone the same state," a "critical requirement" under § 111(f). 57 Fed.Reg. at 3290. Moreover, the Office concluded that § 111(f) was "clearly directed at localized retransmission services," based on the section's provision that "two or more cable systems in *contiguous communities* . . . operating from *one headend*" constitute one "cable system" for purposes of determining royalties. *Id.* at 3292. The Office reasoned that the terms "contiguous communities" and "headend" [5]—applicable to local retransmissions—are anomalous in the context of geospherically orbiting satellite technology. *Id.* The Office further noted that § 111(f)'s definition of a "distant signal equivalent" [6] by reference to television stations "within whose local service area the cable system is located" is similarly inapplicable to satellite carriers. *Id.* Finally, the Office concluded that the legislative history is devoid of any indication that Congress considered satellite carriers when enacting the compulsory licensing scheme. *Id.* at 3291.

II.

The Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and applica-

---

[5] A cable system's "headend" is its control center, from which a cable company receives signals and then transmits them, by coaxial cable, to the company's subscribers. *See generally Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 128 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S.Ct. 1232, 75 L.Ed.2d 467 (1983); *United States v. Norris*, 833 F.Supp. 1392, 1394 (N.D. Ind.1993).

[6] The "distant signal equivalent" is a figure used to calculate the percentage of gross receipts owed by a cable system to the copyright holders of programs broadcast. The figure takes into account the number of "distant," *i.e.* not receivable via antenna, independent, network and educational stations carried. *See e.g., Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608-09 (D.C.Cir.), *cert. denied*, 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed.2d 934 (1988).

tion of § 111. *See SBN*, 940 F.2d at 1469 n. 4; *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608-09 (D.C.Cir.), *cert. denied*, 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed2d 934 (1988); *see also DeSylva v. Ballentine*, 351 U.S. 570, 577-78, 76 S.Ct. 974, 978, 100 L.Ed. 1415 (1956) (recognizing that Copyright Office's interpretation of Copyright Act should ordinarily receive deference). As such, the Office's regulations must be upheld unless "they are arbitrary, capricious, or manifestly contrary" to the provisions of the Copyright Act. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Stated otherwise, if the Office has promulgated regulations which contradict the "clear meaning" or "plain language" of the statute, then those regulations must be struck down. *See, e.g., Lechmere, Inc. v. NLRB*, —— U.S. ——, ——, 112 S.Ct. 841, 847, 117 L.Ed.2d 79 (1992); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989); *Barrett v. Adams Fruit Co., Inc.*, 867 F.2d 1305 (11th Cir. 1989), *aff'd*, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990).

Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782 (upholding Environment Protection Agency regulation which contradicted prior D.C.Circuit precedent).[7] Because the rule at issue in *Chevron* was

---

[7] The regulatory scheme at issue in *Chevron* required that "nonattainment" states under the Clean Air Act establish a permit program regulating "new or modified major stationary sources" of air pollution. 467 U.S. at 840-42, 104 S.Ct. at 2780-81. Under an Environmental Protection Agency (EPA) rule, however, "nonattainment" states could adopt a plantwide definition of the term "stationary source," enabling plants with several pollution-emitting devices to circumvent certain EPA permit conditions. *Id.* The D.C. Circuit had invalidated the rule, based on its previous holding in

not "arbitrary, capricious, or manifestly contrary to the statute," it was valid, notwithstanding circuit precedent to the contrary. *Id.*

SBCA argues that the instant action is controlled not by *Chevron*, but rather by *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992). *Lechmere* overruled an NLRB order which contradicted established Supreme Court precedent by extending protection under NLRA § 8(a)(1) to union organizers who were not "employees" covered by the Act. *See* —— U.S. at ——-——, 112 S.Ct. at 845-46 (citing, *inter alia, NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956)). The *Lechmere* Court rejected the Board's application of NLRA protections to nonemployee organizers, and reiterated the rule that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination." —— U.S. at ——-——, 112 S.Ct. at 847-48 (quoting *Maislin Indus. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990)). Relying on *Lechmere*, SBCA contends that we are bound by our holding in *SBN*, absent *en banc* reconsideration of the issues.

Unlike the statutory scheme in *Lechmere*, which explicitly confined the protected class under NLRA § 8(a)(1) to "employees," § 111(f) is far from explicit as to the inclusion of satellite carriers. For this reason, we rested our decision in *SBN* not upon the statute's "clear meaning," but rather upon inferences drawn from the statutory scheme and upon our policy determination that satellite carriers should be included for the benefit of

---

ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C.Cir.1978). *Natural Resources Defense Council, Inc. v. Gorusch*, 685 F.2d 718, 727 (D.C.Cir.1982); *see also ASARCO*, 578 F.2d at 325-27 (rejecting EPA's application of same rule in similar air-quality program).

their rural customers. We left open the possibility that we might later consider a contrary rule. Noting that the Copyright Office had issued a contrary 1991 policy decision, and anticipating the promulgation of a new rule, we "express[ed] no opinion on the new rule's validity as applied prospectively." 940 F.2d at 1470 n. 4.

Because we did not address the "clear meaning" of § 111(f) in *SBN*, this circuit is not precluded from revisiting our initial interpretation of the regulatory scheme in *SBN*. *See Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781 (Court of Appeals erred by "adopt[ing] a static judicial definition of [the statutory term at issue] when it had decided that Congress itself had not commanded that definition"). A contrary result illogically would wed this circuit to the *SBN* decision, while all other circuits and the Supreme Court would be bound under *Chevron* to defer to the Copyright Office rule. Moreover, it would create a rush to the courthouse among parties wishing to litigate a statute's meaning before an agency has exercised its broad "knowledge respecting the matters subjected to agency regulations." *Chevron*, 467 U.S. at 844-45, 104 S.Ct. at 2782-83 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)).[8]

III.

Having determined that *SBN* did not address the "clear meaning" of "cable system" under § 111(f), we likewise hold that the Copyright Office's construction of "cable

---

[8] We find further support for our decision in *Schisler v. Sullivan*, 3 F.2d 563, 568 (2d Cir. 1993), which addressed a challenge to HHS regulations interpreting the "treating physician rule" used to evaluate disability claims. The Second Circuit upheld the new HHS regulations even though they conflicted with prior circuit precedent, because "[n]ew regulations at variance with prior judicial precedents are upheld unless 'they exceed[] the Secretary's authority [or] are arbitrary and capricious.'" 3 F.3d at 568 (quoting *Heckler v. Campbell*, 461 U.S. 458, 466, 103 S.Ct. 1952, 1956, 76 L.Ed.2d 66 (1983)).

system" to exclude satellite carriers is neither arbitrary, capricious, nor contrary to the statute's "clear meaning." As discussed above, the Copyright Office's exclusion of satellite carriers from the definition of "cable systems" is an interpretation based on reasonable inferences drawn from statutory scheme and policy. Although such an interpretation is not "the only one it permissibly could have adopted . . . or even the reading the court would have [and indeed has] reached . . . in a judicial proceeding," *see Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2781 n. 11, neither can it be said that the interpretation contradicts Congress's "clear meaning." Indeed, virtually nothing in the section's legislative history suggests that Congress even contemplated the entrance of satellite technology into the cable industry. *See* 57 Fed.Reg. at 3291.[9]

Accordingly, we REVERSE the decision of the district court, and REMAND for entry of judgment on behalf of the Copyright Office.

---

[9] The subsequent addition of § 119 to the Copyright Act, *see supra* n. 2, creating a compulsory licensing scheme for satellite carriers, makes it further apparent that § 111 did not plainly address the inclusion of satellite carriers. If it had, § 119 would have been unnecessary.

APPENDIX B

DISTRICT COURT
N.D. GEORGIA

No. 1:92-cv-666-HTW

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

v.

OMAN

Decided January 27, 1993

Ward, J.

This matter is currently before this court on the following motions: (1) plaintiff's motion for summary judgment, (2) plaintiff's motion for summary judgment against defendant United States of America, (3) defendants' cross-motion for summary judgment, and (4) plaintiff's motion for a hearing on its motion for summary judgment. As a preliminary matter, this court DENIES plaintiff's motion for a hearing; in this court's view, the pleadings already submitted in this case provide a sufficient basis for the court's resolution of the parties' motions.

FACTS

Plaintiffs in this matter comprise the Satellite Broadcasting and Communications Association, (hereinafter "SBCA"), as well as several of its members who are so-called "satellite carriers." The satellite carrier plain-

tiffs retransmit broadcast programming via satellite for viewing by home satellite dish owners.

Defendants constitute the Register of Copyrights, the Copyright Office of the Library of Congress, and the United States, all of which have construed Section 111 of the Copyright Act to exclude satellite carriers from the statute's definition of "cable systems." In this lawsuit plaintiffs now challenge the validity of the defendants' interpretation of the statute.

Under Section 111, a "cable system" has an absolute right to retransmit broadcasts, subject to the filing of a statement of account and the payment of royalty fees, as long as it refrains from deleting or altering the broadcast's commercial advertising. *See* 17 U.S.C.A. §§ 111 (d)1, 2(A)-(D), & (3). The Act defines a "cable system" as follows:

> [A] facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables *or other communications channels* to subscribing members of the public who pay for such service.

17 U.S.C.A. § 111(f). (Emphasis supplied).

PROCEDURAL HISTORY

In 1987, the National Broadcasting Company, (hereinafter "NBC"), together with several of its affiliate stations, filed suit against the Satellite Broadcast Networks, (hereinafter "SBN"), one of the plaintiffs in this action. NBC and its affiliates alleged that SBN had infringed their copyrights by retransmitting network programming broadcast by local affiliates. In its defense, SBN stated that it had not infringed the plaintiff's copyrights, since

the rebroadcasts were licensed pursuant to the Section 111 compulsory license procedure.

The district court granted summary judgment in favor of NBC, holding that the defendant satellite carrier was not a cable system, as defined by Section 111(f). The court reasoned that because the defendant satellite carrier was not "located entirely within a single state," the statutory definition of a cable system could not encompass a carrier of this sort.

On appeal, the Eleventh Circuit reversed. *National Broadcasting Company v. Satellite Broadcast Networks*, 940 F.2d 1467 [20 USPQ2d 1071] (11th Cir. 1991). In its opinion, the court held that "SBN is a cable system as defined under § 111 whose secondary transmissions were permissible under FCC rules and regulations." *Satellite, supra*, 940 F.2d at 1471. The court also stated that it saw "no good reason why a satellite broadcasting company such as SBN should not be a cable system." *Satellite, supra*, 940 F.2d at 1470. The court finally rejected NBC's argument that " 'located in any State' means located entirely within a single state." *Id.* at 1470.

In 1992, the Copyright Office rejected the Eleventh Circuit's *Satellite* decision, and promulgated a new and final regulation providing that satellite carriers were not cable systems within the meaning of Section 111. The Copyright Office based this final interpretation on three grounds: (1) that the facilities of a satellite carrier are not located in any state, let alone in the same state, (2) that the Section 111 compulsory license applies only to localized retransmission services regulated by the FCC as cable systems, and (3) that retransmission via satellites were not retransmissions by "other communications channels," as required by the provisions of Section 111. *See* 57 Fed. Reg. 3284, 3290-91.

Plaintiffs then filed this lawsuit in order to challenge the validity of the Copyright Office's regulation.

DISCUSSION

A. *Plaintiff's Motions for Summary Judgment*:

This matter is first before this court on two separate motions for summary judgment submitted by plaintiffs. In plaintiffs' second motion, plaintiffs note that they have added the United States as an additional defendant in this matter, and then advise the court that they intend for the contentions submitted in their first motion to apply to this defendant as well.

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed. R. Civ. P. 56(c). To determine if the moving party meets its burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion. *Carlin Communication*, 802 F.2d at 1356; *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 656 (11th Cir. 1983).

The Supreme Court recently addressed the burdens of proof which each party must carry on a motion for summary judgment, and stated as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The nonmoving party

must identify specific facts which demonstrate that there is a genuine issue for trial; that party may not rest on the allegations or denials in its pleading. *Celotex*, 106 S.Ct. at 2553, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In order to survive defendant's motion, however, plaintiff needed only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. *Anderson*, 106 S.Ct. at 2514-15.

In this case, the regulation issued by the Copyright Office clearly conflicts with the decision issued by the Eleventh Circuit in *National Broadcasting Company v. Satellite Broadcast Networks,* 940 F.2d 1467 [20 USPQ2d 1071] (11th Cir. 1991). Plaintiffs contend that *Satellite* is now the law of this circuit, and that principles of *stare decisis* require this court to set aside the regulation of the Copyright Office. This court agrees. In this court's view, however, plaintiffs' brief shows evidence of some confusion concerning the appropriate roles of district and appellate court in the construction of judicial precedent; the court accordingly offers the following elaboration in an effort to clarify the question.

Defendants contend that the Supreme Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), governs this court's resolution of the conflict between the agency's regulation and the court's decision. Under *Chevron*, the court must first consider whether Congress has already addressed the issue in question; the court may determine whether the agency's interpretation is reasonable only if Congress has failed to confront the matter through any explicit statutory directive. Defendants thus contend that this court's only mandate is to assess the credibility of the regulation issued by the Copyright Office.

Plaintiffs, in contrast, urge that this court adopt the analysis recently enunciated by the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992). In

Lechmere, the Supreme Court emphasized that it would not implement the two-pronged *Chevron* test without first determining whether the agency's construction of the statute is "consistent with our past interpretation" of the provision. *Lechmere*, 112 S.Ct. at 847. As the court stated in *Lechmere*, "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Lechmere*, 112 S.Ct. at 847-48. Plaintiffs accordingly contend that *Lechmere* compels this court to apply the precedent already established by the Eleventh Circuit—that a satellite carrier, in short, is a cable system within the meaning of Section 111.

In this court's view, plaintiffs have somewhat misconstrued the nature of the Court's directive in *Lechmere*; in that case, the Supreme Court intended its language to serve only as an illustration of its *own* procedure, as a final and ultimate appellate authority, when interpreting a statute in the face of pre-existing judicial precedent. District courts, in contrast, must follow, as a matter of course, the precedents established by their appellate courts.

As one circuit court has stated, "[t]he decision of an appellate court is binding (not just persuasive) on those lower in the hierarchy even if not binding on the parties under principles of preclusion—that is, the parties are free to relitigate but unlikely to get anywhere." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532 (7th Cir. 1988). As the Seventh Circuit further elaborated in an earlier case, district courts are not at liberty to reconsider issues already decided by an appellate court:

> Whether a decision is authoritative depends on a variety of factors, of which the most important is the relationship between the court that decided it and the court to which it is cited later as precedent. ***The simplest relationship is hierarchical; the decisions of a superior court in a unitary system binds the inferior courts.***

Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987).

In this case, the Eleventh Circuit has already determined that a satellite carrier, in short, is a cable system within the meaning of section 111. The Eleventh Circuit therefore has made its decision, and must accordingly "give considerable weight to [that] decision[] unless and until [it has] been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling." *Colby*, 811 F.2d at 1123. By the same token, the Eleventh Circuit "is not absolutely bound by [that decision], and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision." *Colby*, 811 F.2d at 1123.

This court, in short, may not, and will not, reconsider a question already resolved by a previous opinion issued by its own appellate court. The Eleventh Circuit issued the opinion, and defendants, if they wish, may argue on appeal that that court should reexamine the question and overrule its decision. *That* court, unlike this one, will have the authority, at least, if not the inclination, to pursue the course now urged by defendants today.

CONCLUSION

This court, therefore, after due consideration, GRANTS both plaintiffs' initial motion for summary judgment, and plaintiffs' motion for summary judgment against defendant United States of America. The court DENIES defendants' cross-motion for summary judgment, and likewise DENIES plaintiff's motion for a hearing.[1]

SO ORDERED.

---

[1] As a courtesy to the clerk of court, this court advises the clerk that this Order terminates entries nos. 11, 17, 22 and 25 on the docket sheet.

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-8597

NATIONAL BROADCASTING COMPANY, INC.,
Plaintiff-Appellee,

v.

SATELLITE BROADCAST NETWORKS, INC.,
Defendant-Appellant.

NBC TELEVISION AFFILIATES,
Plaintiff-Appellee,

v.

SATELLITE BROADCAST NETWORKS, INC.,
Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia

Sept. 4, 1991

Before EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

---

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ESCHBACH, Senior Circuit Judge:

Is Satellite Broadcast Networks, Inc. ("SBN") a "cable system" under 17 U.S.C. § 111? If it is, then it was free to rebroadcast the television signal of a National Broadcasting Company (NBC) affiliate. If not, then SBN is liable to NBC for copyright infringement. We conclude that SBN is a cable system and so reverse the District Court's summary judgment in NBC's favor.

The facts are undisputed. SBN has facilities in Georgia, Illinois and New Jersey that receive the broadcast signals from local television stations. SBN then scrambles the signals and rebroadcasts them across the country by satellite. Any owner of a home satellite dish can receive the signal and, for a fee, receive an unscrambling box from SBN. One of the local signals that SBN has retransmitted is that of WXIA, the Atlanta affiliate of NBC.

NBC filed this action in 1987 claiming that SBN has infringed NBC's exclusive rights in copyrighted work [1] by rebroadcasting WXIA's signal without NBC's permission. NBC's suit is based on 17 U.S.C. § 501(b), which entitles "[t]he legal or beneficial owner of an exclusive right under a copyright . . . to institute an action for any infringement of that particular right. . . ." SBN responds that it committed no infringement. It argues that NBC and its affiliates had no choice but to grant SBN the right to rebroadcast their transmissions because of a "compulsory license" provided in 17 U.S.C. § 111, which states:

> [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing upon compliance with [procedural require-

[1] NBC owns the copyright to a very few television programs, such as *NBC Nightly News* and *Today*. For the majority of its programs, NBC possesses the exclusive right to broadcast. Affidavit of John Damiano ¶¶ 8-9.

> ments and payment of mandatory royalties] where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.

17 U.S.C. § 111(c)(1). NBC must grant SBN the license as long as SBN meets the requirements of § 111. If SBN qualifies for the license, it is not an infringer because it has violated no exclusive rights.

No one disputes that SBN's satellite broadcast was a "secondary transmission"; that WXIA is a broadcast station; and that SBN complied with all the procedural and royalty requirements. The question is whether SBN is a "cable system." The District Court concluded on summary judgment that SBN cannot be a "cable system," and so has no rebroadcast rights under § 111, because its facilities are not located entirely within a single state. Our review of a district court's grant of summary judgment is plenary. *Kendrick v. Jefferson County Bd. of Educ.*, 932 F.2d 910, 912 (11th Cir.1991).

The District Court's view[2] was based on § 111(f), which defines "cable system" as:

---

[2] Outside this litigation, no court has addressed the question whether a satellite rebroadcast facility like SBN can be a cable system under § 111. And it is highly likely that we will be one of the last courts to address the issue. Through the Satellite Home Viewer Act of 1988, Congress has provided a new compulsory license for satellite carriers like SBN. *See* 17 U.S.C.A. § 119 (West Supp.1991). Section 119(e) provides that § 111 is not to be construed as providing any authority for secondary transmissions by satellite carriers while § 119 remains effective. Section 119 became effective on January 1, 1989 and ceases to be effective on December 31, 1994. *See* Pub.L. 100-667 §§ 206-07, 102 Stat. 3960 (1988). The Congress was very careful to note that the Satellite Home Viewer Act is not to be interpreted as impacting SBN's alleged status as a cable system in the current lawsuit. *See* H.R. No. 100-887(I), 100th Cong., 2d Sess. 14, *reprinted in* 1988 U.S.Code Cong. & Admin.News 5611, 5617 and 5630.

> a facility *located in* any State, Territory, Trust Territory, or Possession, that . . . receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals. . . .

17 U.S.C. § 111(f) (emphasis added).[3] The District Court concluded that to be a "facility located in any State," the facility must be located entirely within a single state.[4] In drawing this construction, the Court was at-

---

[3] Section 111(f) goes on to require that the secondary transmission be made through "wires, cables, or other communications channels." A question arises whether a transmission via satellite is one through "other communications channels." We think so. The legislative history shows that in considering the Copyrights Act, Congress understood that the development of satellites promised a new channel for communicating in the future. *See* H.R.Rep. No. 94-1476, 94th Cong., 2d Sess. 47, *reprinted in* 1976 U.S.Code Cong. & Admin.News 5659, 5660. Moreover, in interpreting another provision of § 111, both the Second and the Eighth Circuits have concluded that transmission by "wires, cables or other communications channels" includes satellite broadcasts. *See Hubbard Broadcasting v. Southern Satellite*, 777 F.2d 393, 401-02 (8th Cir.1985), *cert. den.*, 479 U.S. 1005, 107 S.Ct. 643, 93 L.Ed.2d 699 (1986); *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 131 (2d Cir.1982), *cert. den.*, 459 U.S. 1226, 103 S.Ct. 1232, 75 L.Ed.2d 467 (1983).

[4] Subsequent to oral argument in this case, the Copyright Office issued a policy decision that satellite carriers like SBN are not "cable systems" under § 111. Cable Compulsory License; Definition of Cable Systems, Fed.Reg. 31,580 (1991). Specifically, the Copyright Office has ruled that a facility must both receive and transmit signals from within the same state in order to qualify for compulsory licensure. *Id.* at 31,590-91. The Copyright Office's policy decision is one of general applicability (*see id.* at 31,588) and fits within the Agency's rulemaking authority. *See* 5 U.S.C. § 551(4); *cf. Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 607-10 (D.C.Cir.1988) (recognizing the authority of the Copyright Office to interpret § 111), *cert. den.*, 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed.2d 934 (1988). If this recent promulgation applied retroactively to this case, it might be entitled to deferential review under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778,

tempting to limit cable system status to traditional cable companies that serve only local communities. But nothing in the words Congress chose counsel that only local cable

---

2781-83, 81 L.Ed.2d 694 (1984) and *Rust v. Sullivan*, —— U.S. ——, ——-——, 111 S.Ct. 1759, 1766-72, 114 L.Ed.2d 233 (1991). But the language of the Notice does not require that it apply retroactively. And even if it did, we are unconvinced that the Copyright Office would have the authority to issue a retroactive rule, because nothing in either the Administrative Procedure Act or the Copyrights Act explicitly so empowers the Agency. *See* 5 U.S.C. § 551(4) (" 'rule' means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy. . . .") (emphasis added); 17 U.S.C. §§ 701-10; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.") (citations omitted); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990); *Wright v. Director of Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1571-74 and n. 11 (11th Cir.1990); *Chaves County Home Health Serv., Inc. v. Sullivan*, 931 F.2d 914, 923 (D.C.Cir.1991); *General Motors Corp. v. National Hwy. Traffic Safety Admin.*, 898 F.2d 165, 169 (D.Cir.1990); *General Am. Transp. Corp. v. Interstate Commerce Comm'n*, 872 F.2d 1048, 1060-61 (D.C.Cir.1989), *on rehearing*, 883 F.2d 1029, 1030-31 and n. 2 (D.C.Cir.1989) (Silberman, J., concurring), *cert. den.*, —— U.S. ——, 110 S.Ct. 1112, 107 L.Ed.2d 1019 (1990); *Chemical Waste Mgmt., Inc. v. United States Environmental Protection Agency*, 869 F.2d 1526, 1535-37 (D.C.Cir.1989); *cf. Myers v. Sullivan*, 916 F.2d 659, 675-78 (11th Cir.1990) (discussing retroactive application of judicial decisions in an agency proceeding); *Alacare Home Health Serv., Inc. v. Sullivan*, 891 F.2d 850, 854-55 (11th Cir.1990) (retroactivity in an agency adjudicatory proceeding); *Kaiser*, 110 S.Ct. at 1585-88 (Scalia, J., concurring) (discussing the precedent and policy reasons supporting the presumption of nonretroactivity). In any event, we have considered the views of the Copyright Office on the language and legislative history of § 111, but we find those views unpersuasive. We of course express no opinion on the new rule's validity as applied prospectively.

companies be included,[5] and if Congress had intended to benefit only community-based systems, it could have defined "cable system" more narrowly. *Cf.* 47 U.S.C. § 522(6) (defining "cable system" in the Cable Communications Policy Act to mean a facility that provides video programming to multiple subscribers "within a community"). We are thus unpersuaded that "located in any State" means located entirely within a single state. Indeed, if this narrow reading were to prevail, many of the concededly traditional local systems serving communities that cross a state border[6] would lose their cable system status.

Reading "located in any State" so narrowly also ignores the definition that immediately precedes that of "cable system"—the definition of "secondary transmission." A secondary transmission:

> "is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission *if by a 'cable system' not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico . . .*"

§ 111(f) (emphasis added). The highlighted portion is a rather cumbersome way of describing a cable system located entirely within Alaska. But a nonsimultaneous broadcast is *not* a secondary transmission if made by a

---

[5] The legislative history supports our conclusion that Congress intended to paint with a broad brush: "Cable television systems are commercial subscription services that pick up broadcasts of programming originated by others and retransmit them to paying subscribers." 1976 U.S.Code Cong. & Admin.News at 5702. SBN clearly fits this definition.

[6] TCI of Maryland, Inc. serves subscribers in West Virginia, Pennsylvania and Maryland; Cox Cable Quint-Cities serves subscribers in Illinois and Iowa; and Comcast Cablevision of Paducah serves subscribers in Kentucky and Illinois. Affidavit of G. Todd Hardy ¶ 3.

cable system located *partly in Alaska and partly in some other state.* If a cable system must be located entirely within a single state, it would have been sufficient for Congress to say "if by a 'cable system' located in Alaska." This suggests that Congress understood it would be possible for a cable system to exist "in part" within Alaska and "in part" elsewhere. This suggestion is consistent with our analysis, but conflicts with the District Court's view, that a cable system can never exist in part in one state and in part in another.

Finally there is no good reason why a satellite broadcasting company such as SBN should not be a cable system.[7] Without dispute, SBN could have broadcasted its signal to other cable systems located throughout the nation with each of these cable systems passing the signal along to the public. *See EMI*, 691 F.2d at 132-35 and n. 17 (EMI transmitted its signal to 600 cable systems); *Hubbard Broadcasting*, 777 F.2d at 401-05. SBN has simply eliminated the middleman. *See EMI*, 691 F.2d at 131, 133. Moreover, to conclude that SBN cannot be a cable system because of its geographic reach would be to prevent those in sparsely populated areas from receiving the quality television reception technology can provide. Common practice in the traditional community-based cable television industry assumes it is uneconomical

---

[7] NBC laments that because of SBN's broad geographic reach, SBN threatens the major television networks. For instance, an SBN subscriber in Arizona could view the WXIA broadcasts of *L.A. Law* or *Cheers* hours before the NBC affiliate in Arizona broadcasted these episodes. NBC may have a legitimate gripe, but protecting the network system is not a concern of § 111. "[T]he retransmission of network programming, including network programming in 'distant' markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly." 1976 U.S.Code Cong. & Admin.News at 5704; *see also Cablevision Sys. Dev.*, 836 F.2d at 603; *Hubbard*, 777 F.2d at 396. NBC's concerns are more about communications policy than about copyright infringement and are more appropriately directed to the FCC.

to wire homes in areas with less than 40 households per square mile. Affidavit of Mary (Kazie) Catherine Metzger ¶ 10. The majority of SBN's customers live in these sparsely populated areas not served by traditional cable television. *Id.* at ¶ 14. Indeed, many live outside the reach of the signals of one or all of the networks' programming. *Id.* at ¶ 15. If these people are to receive cable at all, it will have to be satellite-based cable. In short, there is no good reason to read "cable system" narrowly to deny SBN its license, and to do so will do an injustice to those who live in rural areas. SBN is a cable system.

A minor issue that remains is that § 111(c)(1) gives SBN rebroadcast rights only if that rebroadcast was "permissible under the rules, regulations, or authorizations" of the FCC. The short answer is that the rebroadcast was permissible because no rule or regulation forbade it.

NBC has argued that before SBN's transmissions could become "permissible," the FCC had to affirmatively approve them. But to require express approval of the FCC would be to reach a result from the FCC's inaction that the FCC unequivocally does not intend. The FCC has expressed sympathy for NBC's concerns that direct-to-home satellite distribution threatens the network-affiliate relationship (*see supra* note 7), but the FCC has explicitly stated it would not address these concerns until after the courts have resolved the copyright infringement issue. *See* Inquiry into the Scrambling of Satellite Television Signals, First Report, 2 FCC Rcd. 1669 ¶¶ 200-01 (1987). More to the point, the FCC has said "The question of whether the cable compulsory license applies to [home satellite dish] sales is unresolved. *We do not purport to resolve it.*" Inquiry into the Scrambling of Satellite Television Signals, Second Report, FCC 88-67, Docket No. 86-336 n. 27 (released March 11, 1988) (emphasis added). We will not read a result from the FCC's failure to act that the FCC neither intends nor

foresees. The secondary transmissions were "permissible" under existing FCC rules, regulations and authorizations.

SBN is a cable system as defined under § 111 whose secondary transmissions were permissible under FCC rules and regulations. Therefore, SBN's rebroadcast of WXIA's signal infringed no copyright. The judgment of the District Court is REVERSED. The award of attorney's fees in favor of NBC is also REVERSED.

No. 93-2055

In the Supreme Court of the United States

OCTOBER TERM, 1994

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, ET AL., PETITIONERS

v.

MARYBETH PETERS, REGISTER OF COPYRIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Copyright Office's reasonable interpretation of an ambiguous provision of the Copyright Act of 1976, notwithstanding a prior decision of the court of appeals, rendered without the benefit of the agency's final interpretation, construing the Act differently.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Argument	6
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

BPS Guard Services, Inc. v. *NLRB*, 942 F.2d 519 (8th Cir. 1991)	11
Cablevision Systems Development Co. v. *Motion Picture Ass'n of America, Inc.*, 836 F.2d 599 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988)	7
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	4, 6, 7
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989)	8, 9
Lechmere, Inc. v. *NLRB*, 112 S. Ct. 841 (1992)	4, 5, 6
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	6
McDonnell Aircraft Co. v. *NLRB*, 827 F.2d 324 (8th Cir. 1987)	11, 12
National Broadcasting Co. v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991)	2, 3, 5, 7, 8
Saxon v. *Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968)	9
Schisler v. *Sullivan*, 3 F.3d 563 (2d Cir. 1993)	11
United States v. *Jackson*, 968 F.2d 158 (2d Cir.), cert. denied. 113 S. Ct. 664 (1992)	10

Cases—Continued: Page

United States v. *Palacio*, 4 F.3d 150 (2d Cir. 1993), cert. denied, 114 S. Ct. 1194 (1994) 10, 11
Variable Annuity Life Ins. Co. v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), cert. granted *sub nom. NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994) 9, 10

Statutes and regulation:

Copyright Act of 1976 (17 U.S.C.) 2
17 U.S.C. 102 ..... 1a
17 U.S.C. 111 ..... 2, 3, 4, 5, 7, 12, 1a
17 U.S.C. 111(c)(1) 2, 1a
17 U.S.C. 111(f) 2, 4, 5, 7, 8, 12, 1a-2a
17 U.S.C. 119 13
17 U.S.C. 119 note 13
17 U.S.C. 702 ..... 7, 2a
National Bank Act, 12 U.S.C. 21 *et seq.* 9
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 5
§ 9(b)(3), 29 U.S.C. 159(b)(3) 11
Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, Tit. II, 102 Stat. 3949:
§ 202(2), 102 Stat. 3949-3958 13
§ 207, 102 Stat. 3960 13
21 U.S.C. 841(b) 10
37 C.F.R. 201.17(k) 3

Miscellaneous:

139 Cong. Rec. H876 (daily ed. Feb. 24, 1993) 13
140 Cong. Rec. (1994):
p. S5935 (daily ed. May 18, 1994) 13
p. D764 (daily ed. June 29, 1994) 13
56 Fed. Reg. 31,580 (1991) 3
57 Fed. Reg. (1992):
p. 3284 3
p. 3290 ..... 4, 12, 13
58 Fed. Reg. (1993):
p. 40,363 13
p. 45,263 13
H.R. 1103, 103d Cong., 1st Sess. (1993) 13
S. 1485, 103d Cong., 1st Sess. (1993) 13

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2055

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, ET AL., PETITIONERS

v.

MARYBETH PETERS, REGISTER OF COPYRIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 17 F.3d 344. The opinion of the district court (Pet. App. 10a-16a) is reported at 26 U.S.P.Q.2d (BNA) 1313.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1994. The petition for a writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Copyright Act of 1976 are set forth in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. Under the Copyright Act of 1976, Title 17, United States Code, a cable system is entitled to retransmit broadcast signals to customers under a compulsory license. 17 U.S.C. 111(c)(1). The Act defines a cable system for this purpose as "a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service." 17 U.S.C. 111(f).

The Act does not specifically address the question whether a satellite carrier qualifies as a "cable system" under Section 111. A satellite carrier retransmits programming from broadcast signals via satellite so that the programming may be viewed in homes that have a satellite dish and that have paid the satellite carrier the requisite fee for an unscrambling device. Pet. App. 2a, 10a-11a, 18a. In *National Broadcasting Co.* v. *Satellite Broadcast Networks, Inc. (SBN)*, 940 F.2d 1467 (1991) (*reproduced at* Pet. App. 17a-25a), the Eleventh Circuit ruled that a satellite carrier is a "cable system" under Section 111. The court of appeals rejected the district court's view that a cable facility, to qualify as a "facility located in any State," 17 U.S.C. 111(f), "must be located entirely within a single state." Pet. App. 20a. The court explained that if Congress had intended the single-state

requirement, it could have drafted the statute more clearly and concisely. The court also indicated that to exclude satellite carriers would deprive persons in sparsely populated regions of high quality television reception. *Id.* at 21a-24a.

The court of appeals noted in *SBN* that the Copyright Office had issued "a policy decision that satellite carriers * * * are not 'cable systems' under § 111." Pet. App. 20a n.4, citing Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580 (1991). While acknowledging that the policy decision "fits within the Agency's rulemaking authority," the court of appeals was not convinced that the rule was meant to apply retroactively or that the Copyright Office had authority to issue retroactive rules. Pet. App. 20a n.4. Moreover, while the court indicated that it found the views of the Copyright Office on the statutory language and history "unpersuasive," the court "express[ed] no opinion on the new rule's validity as applied prospectively." *Id.* at 21a n.4.

2. Subsequently, the Copyright Office promulgated a final regulation providing that satellite carriers are not cable systems within the meaning of 17 U.S.C. 111. Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992) (rule codified at 37 C.F.R. 201.17(k)).[1] In its promulgation statement, the Copyright Office explained that it rejected the Eleventh Circuit's reasoning in *SBN* because, among other rea-

---

[1] 37 C.F.R. 201.17(k) states, in pertinent part: "Satellite carriers * * * are not eligible for the cable compulsory license based upon an interpretation of the whole of section 111 of title 17 of the United States Code. At its election, any such entity who paid copyright royalties into the Copyright Office in an attempt to comply with 17 U.S.C. 111 may obtain a refund of the royalties."

sons, "the facilities of a satellite carrier, specifically the facilities which make the secondary transmission, are not located in any state, let alone the same state." 57 Fed. Reg. 3290 (1992). Thus, the Copyright Office concluded (*ibid.*) that satellite carriers do not satisfy a "critical requirement" of the definition of "cable system," *i.e.*, that the facilities be "located in any State." 17 U.S.C. 111(f).

3. Petitioners are satellite carriers and an industry trade association. They commenced an action in the United States District Court for the Northern District of Georgia challenging the validity of the Copyright Office's regulation. Pet. App. 10a-12a. The district court granted summary judgment in favor of petitioners. *Id.* at 16a. The court rejected petitioners' contention that, under *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992), the Copyright Office's regulation was invalid because it conflicted with the prior interpretation of Section 111 rendered by the Eleventh Circuit in *SBN*. Pet. App. 14a-15a. The court concluded, however, that *it* was bound by *SBN*'s holding that "a satellite carrier * * * is a cable system within the meaning of section 111." *Id.* at 16a. The court explained that it was not free to "reconsider a question already resolved * * * by its own appellate court." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-9a. The court noted that the Copyright Office is empowered "to promulgate rules concerning the meaning and application of § 111." *Id.* at 5a-6a. Accordingly, the court applied the principle that the Copyright Office's rules are entitled to judicial deference "unless 'they are arbitrary, capricious, or manifestly contrary' to the provisions of the Copyright Act." *Id.* at 6a, quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The court added

that the principle of deference to permissible agency interpretations remains applicable even if the agency's interpretation contradicts a precedent of the court of appeals—the situation that existed in *Chevron* itself. Pet. App. 6a & n.7.

The court of appeals rejected petitioners' claim that it was bound by the Eleventh Circuit's *SBN* ruling under *Lechmere, Inc.* v. *NLRB*, *supra*. In *Lechmere*, this Court invalidated an interpretation of the National Labor Relations Act rendered by the National Labor Relations Board, because that interpretation contradicted a prior holding of the Supreme Court articulating the statute's "clear meaning" on the relevant issue. Pet. App. 7a, citing *Lechmere*, 112 S. Ct. at 847-848. "Unlike the statutory scheme in *Lechmere*," the court of appeals explained, Section 111(f) "is far from explicit as to the inclusion of satellite carriers." Pet. App. 7a. The decision in *SBN* had not expounded the statute's "clear meaning," but had drawn on "inferences * * * from the statutory scheme and upon our policy determination that satellite carriers should be included for the benefit of their rural customers." *Id.* at 7a-8a. The court also noted that *SBN* had explicitly left open the prospective validity of the Copyright Office's interpretation of Section 111. Pet. App. 8a, citing *SBN*, Pet. App. 21a n.4.

In light of those factors, the court of appeals held that it was not precluded from judging the Copyright Office's rule against *Chevron* standards rather than against *SBN*'s holding. Pet. App. 8a. "A contrary result," the court explained, "illogically would wed this circuit to the *SBN* decision, while all other circuits and the Supreme Court would be bound under *Chevron* to defer to the Copyright Office's rule." *Ibid.*

Turning to the underlying merits of the dispute, the court of appeals determined that the Copyright Office's

interpretation of the statute was a permissible one and therefore valid under *Chevron*. Pet. App. 8a-9a. The court observed that not only was the interpretation consistent with "Congress's 'clear meaning,'" but "virtually nothing in the section's legislative history suggests that Congress even contemplated the entrance of satellite technology into the cable industry." *Id.* at 9a.

ARGUMENT

1. Petitioners contend (Pet. 9-13) that the court of appeals erred by applying principles of deference in reviewing the Copyright Office's rule, rather than giving stare decisis effect to the court's prior holding in *SBN*. According to petitioners (Pet. 12), the court of appeals' analysis conflicts with *Lechmere, Inc.* v. *NLRB*, in which this Court stated that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." 112 S. Ct. at 847-848, quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). There is no merit to petitioners' contention.

In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, this Court made clear that in reviewing an agency's interpretation of a federal statute entrusted to its administration, the validity of the interpretation turns on two inquiries. The first inquiry is whether Congress itself has expressed an intention on the relevant issue. If Congress has manifested its intent, both the courts and the agency are bound by that statutory meaning.[2] The second inquiry arises if

---

[2] "First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of

Congress has failed to express an intent on the specific issue or if the statute is ambiguous. In that setting, a court does not substitute its own interpretations for those of the agency authorized to administer the statute, but is required to give deference to the agency's interpretations "unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844.

The court of appeals correctly applied *Chevron* by giving deference to the agency's interpretation here. The court found that Congress had not expressed an intention on the precise issue of whether a satellite carrier is a "cable system" under Section 111(f) of the Copyright Act.[3] Accordingly, it gave deference to the permissible construction of the statute by the Copyright Office, which has authority to promulgate rules interpreting the Act. See 17 U.S.C. 702; *Cablevision Systems Development Co.* v. *Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608-609 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988).

Contrary to petitioners' claim, *Lechmere* did not require the court to apply stare decisis and invoke its prior interpretation of Section 111 in *SBN* to find the Copyright Office rule invalid. First, *SBN* itself explicitly stated that the court was leaving open the validity of the Copyright Office's rule. Pet. App. 20a n.4. Because the *SBN* court did not purport to determine the rule's validity, its holding did not have any stare decisis

---

Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843.

[3] The statute applies to "a facility, located in any State, Territory, Trust Territory, or Possession." 17 U.S.C. 111(f). The text of the statute does not have an unambiguous meaning as applied to a satellite facility orbiting 22,000 miles above any State.

effect on that issue. Thus, *SBN* did not preclude the court of appeals from later reviewing the Copyright Office's rule under *Chevron* when the rule's validity was squarely presented. *SBN* itself noted that if it had been reviewing the Copyright Office's rule as applied retroactively, the interpretation "might be entitled to deferential review under *Chevron*." Pet. App. 20a n.4.

Second, *SBN* did not articulate the "clear meaning" of Section 111(f) under the first step of *Chevron*. In contrast to this Court's conclusion in *Lechmere* that a prior decision of the Court had resolved the statute's clear meaning, the *SBN* decision relied "upon inferences drawn from the statutory scheme and upon [the court's] policy determination that satellite carriers should be included for the benefit of their rural customers." Pet. App. 7a-8a. The *SBN* court thus resolved an issue of interpretation on which Congress had not expressed a clear intention. Nothing in *Lechmere* suggests that a court should give stare decisis effect to its own elucidation of an ambiguous provision once the agency vested by Congress with responsibility for administering the statute has expressed a contrary view.

Relying on *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 112 (1989), petitioners argue (Pet. 12 n.8) that *SBN* deserved stare decisis effect even if the court were imposing its own construction on an ambiguous provision. In *Golden State*, the Court stated that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute." 493 U.S. at 112. That case, however, did not address any question of judicial review of an agency interpretation. Rather, the federal government had "no authority" to address the

statutory construction issue involved in *Golden State Transit*. *Id.* at 108.

If petitioners' view of stare decisis were accepted, it would lead to absurd results. As the court of appeals noted, Pet. App. 8a, petitioners' view would compel one regional court of appeals to adhere to its prior decision and find the rule invalid, while every other court of appeals—and this Court—would be bound to give the rule *Chevron* deference. It would make little sense for a court of appeals to decline to review the rule under *Chevron*, with the effect that this Court would more often have to intervene to resolve conflicts and review the rule under the proper standard of deference. Moreover, petitioners' approach would encourage parties to seek a judicial construction of a statute before an agency has a chance to interpret it through rulemaking. Pet. App. 8a. Giving precedence to the view of the court rather than the agency in such a setting would conflict with Congress's judgment to vest administrative responsibility in expert agencies and with the *Chevron* framework that this Court established to implement that judgment.

2. Petitioners err in contending (Pet. 13-14) that the decision in this case conflicts with decisions of other courts of appeals. In *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295, 1299-1300 (5th Cir. 1993), cert. granted *sub nom. NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994) (No. 93-1612), the court of appeals struck down an agency rule in reliance on *Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), believing that that case had found certain sales of annuities to be prohibited by the "plain language" of the National Bank Act. 998 F.2d at 1299. The Fifth Circuit explained that judicial deference to an agency's

interpretation "is not appropriate under *Chevron* if the intent of Congress is clear." *Ibid.* That statement does not conflict with the court of appeals' decision to give deference to the Copyright Office's interpretation where the intent of Congress was not clear.[4]

Similarly distinguishable is *United States* v. *Palacio*, 4 F.3d 150 (2d Cir. 1993), cert. denied, 114 S. Ct. 1194 (1994). There, despite contrary views expressed by the Sentencing Commission, the court of appeals followed its prior decision in *United States* v. *Jackson*, 968 F.2d 158 (2d Cir.), cert. denied, 113 S. Ct. 664 (1992), which had interpreted the meaning of cocaine base under 21 U.S.C. 841(b). 4 F.3d at 154-155. *Palacio* does not conflict with the decision below for two reasons. First, the prior decision in *Jackson* purported to apply Congress's intent on the precise issue before the court. See 968 F.2d at 163 ("Expert testimony in this case established that there is a clear definition of 'cocaine base' undisputed in the scientific community. It is that meaning that Congress intended section 841(b) to have."). *SBN*, in contrast, constituted an interpretation of the statute on an issue that Congress had not considered or addressed. Second, unlike regulatory agencies that adopt implementing rules for statutes they administer—such as the Copyright Office in this case—the Sentencing Commission's function is to promulgate sentencing guide-

---

[4] In our view, the Fifth Circuit erred in holding that the plain language of the National Bank Act bars the disputed annuity sales. Our petition in *Variable Annuity Life Ins. Co.*, however, raises no question about the stare decisis effect of the *Saxon* decision. Thus, contrary to petitioners' suggestion (Pet. 13 n.9), there is no reason to hold the petition in this case pending the decision in *Variable Annuity Life Ins. Co.*

lines, not to construe or administer the provisions of federal criminal statutes. *Palacio*, 4 F.3d at 155.

Any suggestion that the Second Circuit would follow a different rule than the court applied in this case is laid to rest by *Schisler* v. *Sullivan*, 3 F.3d 563 (2d Cir. 1993). In *Schisler*, the court held that it was not bound by its earlier interpretation of an ambiguous federal statute when reviewing the agency's subsequent interpretation. The court explained (*id.* at 568):

> New regulations at variance with prior judicial precedents are upheld unless "they exceeded the Secretary's authority [or] are arbitrary and capricious." [*Heckler* v.] *Campbell*, 461 U.S. [458] at 466, 466-68 [(1983)]; [*Bowen* v.] *Yuckert*, 482 U.S. [137] at 144-54 [(1987)] (upholding Secretary's "severity" regulation as valid under the Act; rejected court's prior rule); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-45 (1984) (upholding EPA regulation's construction of a statutory term despite conflicts between it and court's precedents); *Grocery Mfrs. of America, Inc. v. Gerace*, 755 F.2d 993, 1001 (2d Cir.), *aff'd*, 474 U.S. 801, *cert. denied*, 474 U.S. 820 (1985).

Finally, *BPS Guard Services, Inc.* v. *NLRB*, 942 F.2d 519 (8th Cir. 1991), held that *McDonnell Aircraft Co.* v. *NLRB*, 827 F.2d 324 (8th Cir. 1987) (*McDonnell II*), required that court to reject an interpretation of the labor laws by the National Labor Relations Board. The issues in *McDonnell II* and *BPS Guard Services* were identical: whether the National Labor Relations Board had reasonably determined that fire fighters were not "guards" within the meaning of Section 9(b)(3) of the National Labor Relations Act, 29 U.S.C. 159(b)(3). 942 F.2d at 523-524. The Eighth Circuit ruled (*id.* at 524)

that it would adhere to its prior construction of the statute in *McDonnell II*, 827 F.2d at 330, which had held the agency's interpretation to be invalid under the statute. The court of appeals in this case did not confront that situation. Here, the court's prior construction of the Copyright Act in *SBN* did not purport to review (let alone invalidate) the agency interpretation that was before the court in this case.

3. Finally, there are two additional reasons that undercut petitioners' request for this Court's review.

First, the court of appeals was correct in upholding, under *Chevron*, the Copyright Office's view that satellite carriers are not "cable systems" under Section 111. Petitioners have not requested the Court to review that holding (see Pet. (i)), and it is an independent justification for the judgment below. Quite apart from whether the Eleventh Circuit should have considered itself bound by stare decisis to reject the Copyright Office's rule, this Court would not be bound by any lower court precedent on that issue. And, under a proper application of *Chevron*, the Copyright Office's interpretation is plainly reasonable and entitled to deference.[5]

---

[5] The Copyright Office explained that, to be a cable system, a "facility" must be "located in any State," "receive[]" signals of FCC-licensed stations, and "make[] secondary transmissions." 57 Fed. Reg. 3290 (1992), citing 17 U.S.C. 111(f). A satellite carrier's facility is "not located in any state," but rather makes secondary transmissions "from geostationary orbit above the earth." *Ibid.* In addition, for purposes of determining royalties, Section 111(f) instructs that "two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system." 17 U.S.C. 111(f). Because satellite carriers have no "headends", they lack the physical properties that Congress assumed would be present in establishing a royalty scheme for "cable system[s]." 57 Fed. Reg. 3290 (1992). Finally, for a variety of reasons, the compulsory

Second, Congress is currently considering legislation that would address the underlying dispute in this case.[6] In the Satellite Home Viewer Act of 1988, Congress expressly created a compulsory license for satellite rebroadcast facilities. Pub. L. No. 100-667, Tit. II, § 202(2), 102 Stat. 3949-3958, codified at 17 U.S.C. 119. That temporary compulsory license provision will expire on December 31, 1994. Pub. L. No. 100-667, Tit. II, § 207, 102 Stat. 3960, 17 U.S.C. 119 note. The Senate, however, has passed a bill that would extend that sunset date until December 31, 1999, and make satellite carriers eligible for compulsory licensing under certain circumstances. S. 1485, 103d Cong., 1st Sess. (1993); see 140 Cong. Rec. S5935 (daily ed. May 18, 1994). The House is currently considering similar legislation. H.R. 1103, 103d Cong., 1st Sess. (1993); see 139 Cong. Rec. H876 (daily ed. Feb. 24, 1993) (bill introduced and referred to Committee on the Judiciary); 140 Cong. Rec. D764 (daily ed. June 29, 1994) (bill reported by Committee on the Judiciary as amended). Congress's active consideration of the issue counsels against this Court's review of the decision in this case.

---

license regime for cable systems was "clearly directed at localized transmission services" (*ibid.*), not at satellite facilities in geostationary orbit 22,000 miles above the earth.

[6] For that reason, the Copyright Office has delayed the original January 1, 1994, effective date of the rule at issue in this case. See 58 Fed. Reg. 40,363 (1993) ("[T]he legislative climate is bright for satisfying the copyright needs of satellite carriers, MDS, MMDS and other providers with respect to retransmission of broadcast programming. In order to foster the opportunity for congressional action, the Copyright Office is extending the effective date of its cable definition regulation, § 201.17(k), to January 1, 1995."); see also 58 Fed. Reg. 45,263 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys

AUGUST 1994

APPENDIX

The Copyright Act, Title 17, United States Code, provides, as pertinent here:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. * * *

§ 111. Limitations on exclusive rights: Secondary transmissions

* * * * *

(c) Secondary Transmissions by Cable Systems.—

(1) * * * [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station * * * shall be subject to compulsory licensing * * *.

* * * * *

(f) Definitions.—As used in this section, the following terms and their variant forms mean the following:

* * * * *

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

§ 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

Supreme Court, U.S.
FILED
AUG 26 1994
OFFICE OF THE CLERK

No. 93-2055

In The
Supreme Court of the United States
October Term, 1993

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, ET AL.,

Petitioners,

v.

MARYBETH PETERS, IN HER CAPACITY AS REGISTER OF COPYRIGHT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

Dennis Lane*
MORRISON & HECKER
1150 18th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 785-9100

August 26, 1994

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE WRIT 3

1. Compulsory Licenses Must Be Narrowly Construed 4

2. The Purpose Behind Creation Of The Cable Compulsory License Does Not Apply To Satellite Carriers 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Duchess Music Corp. v. Stern,
458 F.2d 1305 (9th Cir.),
cert. denied, 409 U.S. 847 (1972) 4

Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc.,
507 F.2d 667 (5th Cir. 1975) 4

STATUTES

15 U.S.C. § 702 2

17 U.S.C. § 101 *et seq.*
(1988 & Supp. V 1993) 2

17 U.S.C. § 106 4

17 U.S.C. § 111(f) 2, 4, 5, 7

17 U.S.C. §§ 111 and 119 . . . . . 2, 3

17 U.S.C. § 119 . . . . . 2, 3, 4, 5, 7, 8

H.R. 1103 7

H.R. Rep. No. 1476, 94th Cong. 2d Sess. 61 (1976),
reprinted in 1976
U.S.C.C.A.N. 5659 . . . . . 4, 5, 6

H.R. Rep. No. 887, 100th Cong., 2d Sess. (1988),
reprinted in 1988
U.S.C.C.A.N. 5611 5

No. 93-2055

In The

Supreme Court of the United States

October Term, 1993

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, ET AL.,

Petitioners,

v.

MARYBETH PETERS, IN HER CAPACITY AS REGISTER OF COPYRIGHT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

This amicus brief is filed with the express written consent of the Petitioners and the Respondents.

Motion Picture Association of America, Inc. ("MPAA") has actively participated on behalf of its member companies and approximately 100 producers, syndicators, and distributors of syndicated series, movies and specials in virtually all the legislative, administrative and judicial proceedings involving the

cable and satellite carrier compulsory licensing plans of 17 U.S.C. §§ 111 and 119. The MPAA-represented claimant group is the largest single recipient of the cable and satellite carrier royalties distributed under those plans.

MPAA offers the copyright owners' viewpoint, which is otherwise unrepresented here, to this Court. MPAA's interest as an amicus curiae supporting respondents in this case is two-fold.

First, MPAA supports a narrow interpretation of compulsory licensing plans to allow owners maximum flexibility to license their works in the free marketplace. Second, MPAA supports the uniform and consistent implementation and administration of compulsory licensing plans by the Copyright Office, the agency delegated those responsibilities. 15 U.S.C. § 702.

SUMMARY OF ARGUMENT

Compulsory licenses granted as part of the Copyright Act of 1976 ("the Act"), as amended, 17 U.S.C. § 101 *et seq.* (1988 & Supp. V 1993), limit the exclusive rights granted to copyright owners. As limitations, they are to be construed narrowly. Congress found that satellite carriers, such as Petitioners, should be granted a limited term compulsory license for their retransmission of television station signals during a short transition period before free market conditions would control. 17 U.S.C. § 119.

Petitioners' position seeks to evade that congressional determination by fitting satellite carriers within the definition of "cable system" found in 17 U.S.C. § 111(f), which would allow carriers to enjoy the benefits of a wholly separate compulsory licensing plan. A determination to place satellite

carriers under a different statutory compulsory license after the sunset of the Section 119 license should be made by Congress, not by the courts.

REASONS FOR DENYING THE WRIT

From a copyright policy standpoint, Petitioners have not demonstrated any basis for review by this Court. The copyright law favors free market decisions as the best means of serving the dual purposes underlying copyright law of promoting the development of original works and of making those works widely available to the public. Free market decisions spurred enormous growth in the telecommunications industry since the Copyright Act was enacted. That growth has increased the amount of original programming available as well as new means—including delivery by satellite carriers to home dishes—of transmitting programming to the public.

Petitioners contend that "[b]ecause [Section 119] does not cover the years prior to 1989 and because [Section 119] will expire by its own terms at the end of this year, the availability of the compulsory license contained in § 111 continues to be crucial to satellite carriers." Petition For Certiorari at 5 n.3. No showing has been made, however, that satellite carriers, a group composed entirely of a few large entities, will be unable to obtain authorization to retransmit copyrighted television programming through private licensing arrangements when their Section 119 license sunsets.[1] Nor has it been shown why the courts should thwart the congressional purpose of a transitory compulsory licensing plan for satellite carriers by replacing it with the cable compulsory licensing plan.

---

[1] Likewise, any pre-1989 liability questions concerning satellite carrier copyright liability for retransmitted televisions programming could be resolved by private arrangements.

1. Compulsory Licenses Must Be Narrowly Construed

Congress established broad categories of exclusive rights, 17 U.S.C. § 106, "[s]ubject to sections 107 through 120." *Id.* The latter sections restrict those rights by various limitations, among which are several compulsory licensing provisions. *E.g.,* 17 U.S.C. § 111 and § 119. By granting broad rights that "may be subdivided indefinitely and . . . may be enforced separately," Congress anticipated that free market conditions offered the best opportunity to maximize the availability of original works to the public. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659. The limitations in Sections 107 - 120 of the Act are narrowly drawn exceptions to be applied in those cases where normal free market conditions were perceived not to work.

Because compulsory licensing provisions restrict the rights of owners to exploit their works fully, such provisions have been interpreted narrowly to avoid their overwhelming the rights of owners:

> We begin by noting that the compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule. Thus we should neither expand the scope of the compulsory license provision beyond what Congress intended in 1909 nor interpret it in such a way as to frustrate that purpose.

Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975); *accord*, *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972).

An expansive reading of the cable compulsory license of Section 111 to allow satellite carriers to enjoy its privileges would frustrate the purposes of that section as well as those of Section 119.

2. The Purpose Behind Creation Of The Cable Compulsory License Does Not Apply To Satellite Carriers

The Section 111 compulsory license for the retransmission of television station programming by cable systems was created to correct a perceived inefficient market situation applicable to cable systems in 1976:

> The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

H.R. Rep. No. 1476 at 89. No similar intent can be found in the legislative history of Section 119. H.R. Rep. No. 887, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611.

At the time Section 111 was enacted, roughly 3,450 cable systems served approximately 7,700 communities. H.R. Rep. No. 1476 at 88. Individual cable systems offer several hundred different "distant signals," as defined by 17 U.S.C. § 111(f), as well as all television station signals that are local to each cable system. Those numbers, which have grown since Section 111

was enacted, suggest why Congress thought it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 1476 at 89.

In contrast, only five satellite carriers (Petition For Certiorari at ii) serve individual consumer households throughout the country. *Id.* at 3. Satellite carriers are owned by large entities and operate on a national level, as compared to the cable situation in 1976 when many cable systems were small, local operations. Satellite carriers do not offer local signals and, as a whole, retransmit approximately 20 different distant signals to their subscribers, according to their latest filings with the Copyright Office. Negotiations for retransmission licenses between a handful of large, national satellite carriers and copyright owners would not pose anywhere near the burden that Congress found negotiations between 3,450 small, local cable systems and copyright owners would pose in 1976.

Further, copyright owners today have the experience of more than 15 years with the cable compulsory license, and five years with the satellite carrier license, and thus are in a better position now to negotiate retransmission rights than would have been possible in 1976. In addition, copyright owners have privately negotiated the rights to retransmit their works with the plethora of *nonbroadcast* channels (*e.g.*, HBO, USA Network, The Family Channel, ESPN, TNT, CNN) that are made available via cable systems and satellite carriers. Using private negotiations to license works on *nonbroadcast* channels has not impeded their proliferation nor their availability to the public.

The major underlying reason for enacting the cable compulsory license in 1976—the perceived burden of negotiating retransmission rights between copyright owners and thousands of cable systems—does not apply to satellite carriers

today. Congress reached the same conclusion in enacting Section 119, which offers a compulsory license to satellite carriers only through the end of this year after which free market negotiations control.

Expanding the scope of the Section 111 compulsory license to include satellite carriers would frustrate congressional objectives in establishing two very different, but limited, compulsory licensing plans. The cable compulsory license was created to solve a perceived problem that does not exist in the case of satellite carriers. There is no reason to expand the cable compulsory license to include a group not affected by a similar problem. Allowing satellite carriers to take advantage of the cable compulsory license would also extend the term during which satellite carriers are covered by a compulsory license beyond the time authorized by Congress in Section 119.[2]

The ruling below that satellite carriers are not entitled to the privileges of the cable compulsory license is fully consistent with the intent of both Section 111 and Section 119.

CONCLUSION

MPAA believes that pre- and post-Section 119 copyright liability of satellite carriers can and should be resolved by private negotiations. Although the negotiations would not be free from all difficulty, they should be no more difficult than other negotiations regarding the use of copyrighted works. Free market negotiations, not compulsory licenses, are the preferred

[2] Congress may, of course, determine to extend the current term of Section 119. Two bills, H.R. 1103 and S. 1485, are currently before Congress proposing extensions. That decision should be made in the legislative arena, not by judicial interpretation of a different statutory provision.

means for licensing copyrighted works under the overall structure of the Act. The licensing plan set for satellite carriers in Section 119 also looks to private negotiations controlling after 1994. That process should be allowed to work.

Petitioners have demonstrated no reason for this Court to replace the congressional plan for giving satellite carriers a transitory compulsory license with one that would, in effect, extend that license long beyond its legislated term under provisions established for a wholly different situation. Accordingly, MPAA urges this Court to deny the petition.

Respectfully submitted,

Dennis Lane
Morrison & Hecker
1150 18th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 785-9100

Counsel for Amicus Curiae
Motion Picture Association
of America, Inc.

August 26, 1994

FILED
AUG 31 1994
OFFICE OF THE CLERK

(4)

No. 93-2055

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

MARYBETH PETERS, in her capacity as Register of Copyrights, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

CARTER G. PHILLIPS *
R. CLARK WADLOW
MARK D. HOPSON
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioners, Satellite Broadcasting & Communications Association of America, et al.
* Counsel of Record

August 31, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

8 pp

TABLE OF AUTHORITIES

CASES

	Page
ASARCO Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978)	3
Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979)	3
Chevron U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984)	2, 3
Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992)	2
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	5
NBC v. Satellite Broadcast Networks, Inc., 940 F.2d 1467 (11th Cir. 1991)	2
Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	3
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	5
Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom., NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994)	4, 7

STATUTES

17 U.S.C. § 111(f)	1
Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992)	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2055

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

MARYBETH PETERS, in her capacity as Register of Copyrights, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF OF PETITIONERS

In the petition for a writ of certiorari, petitioners demonstrated that the Eleventh Circuit's decision to ignore circuit precedent construing 17 U.S.C. § 111(f) and to defer to the Copyright Office's later interpretation of that statutory language (1) contradicts this Court's decisions in *Chevron* and *Lechmere,* and (2) conflicts with decisions in three other circuits. Respondents' brief in opposition ignores this Court's decision in *Lechmere* and manifestly mischaracterizes both the principle of *stare decisis* and the bases for decision in the court of appeals cases cited by petitioners. Moreover, respondents never dispute the grave consequences to the satellite broadcasting industry if the erroneous decision of the court below is allowed to stand.

1. Respondents, like the court below, seek to ignore this Court's decisions in *Chevron* and *Lechmere* in order

to reach prematurely the issue of agency deference. Respondents claim that because "[t]he [Copyright] Act does not specifically address the question whether a satellite carrier qualifies as a 'cable system' under Section 111," Opp. 2, the provision is somehow automatically ambiguous, and therefore subject to agency interpretation. No such leap is warranted.

Prior to reviewing an agency's regulatory interpretation, a reviewing court must *first* examine the statute to determine if the intent of Congress is clear. *Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Specifically, this Court stated that "[i]f a court, *employing traditional tools of statutory construction,* ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9 (emphasis added). Once such a determination has been made, "we adhere to that determination under the doctrine of *stare decisis,* and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Lechmere, Inc.* v. *NLRB,* 112 S. Ct. 841, 847-48 (1992) (quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)).

The Eleventh Circuit in *NBC* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991) (*"SBN"*) (Pet. App. 17a-25a), made just such a determination of the meaning of Section 111(f). After a thorough examination of "the words Congress chose," Pet. App. 21a, and of what "Congress understood" at the time, Pet. App. 23a, the court determined that Congress had intended to include satellite broadcasters, not just traditional wired cable operators, within the scope of Section 111(f).[1] This determination of the meaning of

[1] In its rulemaking proceeding, the Copyright Office, unlike respondents and the court below, readily admitted that the court in *SBN* had concluded "that *Congress intended* satellite carriers to be

Section 111(f), Pet. App. 25a ("SBN is a cable system as defined under § 111"), derived using traditional tools of statutory interpretation, "is the law and must be given effect" under *Chevron*. 467 U.S. at 843 n.9.[2] The court below failed to accept this interpretation, and the decision below conflicts with this Court's decisions in *Chevron* and *Lechmere*.

---

covered by the cable compulsory license. Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284, 3291 (1992) (emphasis added). As noted in the petition, the Copyright Office promulgated a contrary rule, not because of policy objectives, but because of a disagreement on how the text of the statute was to be interpreted. *See* Pet. App. 7; 57 Fed. Reg. at 3292.

[2] Respondents (and the court below) argue that *SBN* is analogous to the court of appeals decision reversed by this Court in *Chevron*. *See* Opp. 5, Pet. App. 6a & n.7 (EPA regulation "contradicted prior D.C. Circuit precedent"). This simply is not the case. In *Natural Resources Defense Council, Inc.* v. *Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom. Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals did *not* reach its decision to disallow the EPA's use of the "bubble" concept in "nonattainment" schemes on the basis of circuit precedent that previously had construed the precise statutory provision in question. *National Resources Defense Council* instead attempted to analogize the Clean Air Act scheme at issue in the case with the "NSPS" regulations at issue in *ASARCO Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978) (disallowing the use of the "bubble" concept for "NSPS" regulations).

In an opinion conspicuously absent from the Eleventh Circuit's account of the history of *Chevron*, the D.C. Circuit specifically held that the "bubble" concept was to be evaluated separately for each statutory scheme under the Clean Air Act. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 401-02 (D.C. Cir. 1979) (*upholding* the use of the "bubble" concept for "PSD" regulations). Thus, D.C. Circuit precedent permitted the use of the "bubble" concept in appropriate circumstances. The court in *National Resources Defense Council* extracted general principles from the distinctions it drew between the types of programs at issue in *ASARCO* and *Alabama Power* and then chose to ignore the agency's proffered interpretation. *National Resources Defense Council*, 685 F.2d at 726 & n.38. Thus, the court of appeals decision reversed in *Chevron* was not following binding precedent and the doctrine of *stare decisis*.

This issue of the interplay between *Lechmere* and *Chevron* in courts of appeals is a matter of fundamental importance. Not only has the issue spawned a clear conflict among the circuits, but it also creates tremendous uncertainty for litigants and trial costs concerning what role *stare decisis* plays in administrative litigation. Accordingly, for the same reasons this Court decided *Lechmere,* it should review the decision in this case.

2. Respondents fail to distinguish the decisions from other circuits that conflict with the approach adopted by the court below. As discussed above, it is simply not the case that the court in *SBN* did not consider congressional intent in its interpretation of Section 111(f). Respondent effectively concedes that under the approaches taken by the Second, Fifth, and Eighth Circuits, once a court reaches an interpretation based on congressional intent, *stare decisis* requires subsequent panels to invalidate later agency promulgations that are contrary to circuit precedent. Opp. 9-12. It is irrelevant that "the court's prior construction of the Copyright Act in *SBN* did not purport to review (let alone invalidate) the agency interpretation that was before the court in this case." Opp. 12. The court construed Section 111(f) of the Copyright Act and the agency's subsequent interpretation of that provision expressly contradicts it. See Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992). Therefore, the Eleventh Circuit's decision to ignore *stare decisis* and instead to defer to the Copyright Office's interpretation squarely conflicts with decisions of the Second, Fifth, and Eighth Circuits.

3. Respondents argue that this petition should not be held pending the decision in *Variable Annuity Life Insurance Co.* v. *Clarke,* 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom., NationsBank, N.A.* v. *Variable Annuity Life Insurance Co.,* 114 S. Ct. 2161 (1994). Respondents argue that the petition filed on behalf of the Comptroller of the Currency in that case "raises no question about the stare decisis effect of the [prior panel]

decision." Opp. 10 n.4. Respondents fail to note, however, that the case is a consolidated action and that the private petitioners—as well as the respondent in opposition—presented as their first question whether the Fifth Circuit had failed to apply correctly *Chevron* by refusing to adopt the Comptroller's construction of the statute at issue, an interpretation contrary to circuit precedent. *Variable Annuity*, No. 93-1612, Cert. Pet. at i.; *Variable Annuity*, Nos. 93-1612, 93-1613, Br. Opp. at i.

4. The approach taken by the Eleventh Circuit of summarily dismissing circuit precedent and the rule of law it evinces is unwarranted. Respondents, like the panel below, ignore the existing mechanisms for review of prior panel decisions that petitioners set out at Pet. 15-16. The circuit courts can review prior decisions *en banc* and this Court can resolve conflicts among the circuits by granting certiorari in appropriate cases. Congress is also free to intervene and change the law, giving the application of *stare decisis* "special force in the area of statutory interpretation." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Respondents' suggested approach of total deference to agency interpretations, Opp. 9, would effectively preclude judicial review of agency statutory interpretations and is unnecessary.

Furthermore, Congress is *not* currently considering legislation to amend Section 111(f) and it is that statutory provision which the court below and the Copyright Office have interpreted. It begs the question at issue in this case to assume that the current compulsory licensing provision of Section 119 will—or will not—be extended to protect satellite broadcasters. As this Court has noted, "[t]he mere possibility of future legislation in this field does not, of course, affect the legal merits of petitioner's claim." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970).

5. There could be no clearer indication of the importance of the question presented to the satellite broadcasting industry than the filing of an *amicus curiae* brief *in opposition* to certiorari by the Motion Picture Association of America. Unsurprisingly, the MPAA, the largest recipient of copyright royalties, seeks to dissuade this Court from reviewing the decision below so that it can fully "exploit" satellite broadcasters. *Amicus* Br. 4. Although the policy issues addressed in the *amicus* brief are not properly raised in this case, the MPAA *amicus* brief does not accurately portray the problems facing the satellite broadcasting industry if this Court does not review the decision below. While satellite broadcasters may retransmit approximately 20 different broadcast signals to their subscribers, *Amicus* Br. 6, these broadcast signals contain programs whose rights are held by literally hundreds of rightholders. Absent Section 111(f) compulsory licensing, every broadcast *program*, not just every signal, would be the subject of copyright licensing before retransmission would be permitted. Unlike nonbroadcast channels like HBO, local broadcasters do not hold national distribution rights for the programs they broadcast—other than those programs they produce themselves.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Variable Annuity Life Insurance Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom., NationsBank, N.A.* v. *Variable Annuity Life Insurance Co.*, 114 S. Ct. 2161 (1994).

Respectfully submitted,

CARTER G. PHILLIPS *
R. CLARK WADLOW
MARK D. HOPSON
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioners, Satellite Broadcasting & Communications Association of America, et al.

August 31, 1994

* Counsel of Record